COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-1313

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

SCS OF WISCONSIN, INC.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

MILWAUKEE COUNTY,

DEFENDANT-THIRD-PARTY PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

v.

GULF INSURANCE COMPANY, A MISSOURI CORPORATION,

THIRD-PARTY DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 PER CURIAM. Milwaukee County appeals from the judgment entered against it after a jury found that it had breached its contract with SCS of Wisconsin, a construction contractor. Milwaukee County claims: (1) the trial court erred in concluding that the contract was ambiguous; (2) the jury's verdict on bad faith was not supported by sufficient evidence; (3) the jury was erroneously instructed on bad faith; (4) the trial court erred by granting any attorneys' fees to the contractor; and (5) the trial court erred by granting prejudgment interest to the contractor. The contractor cross-appeals, claiming that the trial court should have awarded its actual attorneys' fees. We affirm on the appeal and the cross-appeal.

I. BACKGROUND

¶2 SCS of Wisconsin submitted the lowest bid to demolish a Milwaukee County park's swimming pool area. The parties entered into a contract for the demolition work. The contract provided that, among other things, the contractor was to back-fill and grade the area of its work. A few months later, the contractor began demolition of the pool. When demolition was in its final phase, the County asked the contractor to grade a large hill adjacent to the pool area as part of its bid. The contractor did not regard the hill-excavation work as part of its bid, and refused to grade the hill.[1] The County then terminated the contractor and hired another company to finish the work.

¶3 SCS sued Milwaukee County for breach of contract. Both parties brought motions for summary judgment, each arguing that the unambiguous language of the contract supported its position. The contractor contended that the

[1] Despite the County's assertion to the contrary, the contractor claims to have never regarded the hill-excavation work as part of its bid.

contract language required only the pool and surrounding structures to be removed. Milwaukee County, on the other hand, argued that the contract required excavation and grading of the surrounding area. The trial court denied both motions, holding that the contract language was ambiguous.

¶4 Following a trial, the jury found that Milwaukee County had breached its contract with the contractor by terminating the agreement, and that the County had acted in bad faith. Although Milwaukee County objected to a verdict question on bad faith going to the jury, it did not object to the language of the bad faith instruction.

¶5 By stipulation, the parties left the questions of interest and attorneys' fees to the trial court. The contractor filed a post-verdict motion requesting judgment on the jury's verdict plus interest "at the contract rate" and attorneys' fees. Milwaukee County filed a post-verdict motion asking the trial court to disregard the jury's verdict, arguing, among other things, that the unambiguous language of the contract mandated judgment in its favor. The trial court denied the County's motion:

> I continue to believe that [the contract] is ambiguous with respect to the scope of the responsibilities assigned to the contractor….If I were forced to choose between one or the other versions that are asserted here as the unambiguous conclusion, I would pick the [contractor]'s version.

The trial court entered judgment in favor of the contractor. The trial court awarded interest on the contractor's second draw, but only awarded the contractor those attorneys' fees it spent to defend its bonding company, which was also sued by the County and which the contractor was obligated to indemnify.

II. DISCUSSION

A. The appeal

1. Trial court's determination that contract language was ambiguous.

¶6 Milwaukee County argues that the unambiguous language supports its contract interpretation and, therefore, the trial court erred in not granting its motion for summary judgment, and later, by denying its post-verdict motion to have judgment entered in its favor. Construction of a contract, including the determination of whether its terms are ambiguous, is a legal matter that we decide *de novo*. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). The trial court correctly concluded that the contract was ambiguous.

¶7 Milwaukee County argues that the contract's grading plans and drawing unambiguously describe the scope of the contractor's duties, and "the misunderstanding was only in the mind of [the contractor's] officers." The legend of the drawing shows "existing grading lines" and "finished grading lines." The trial court addressed this issue at the post-verdict motion hearing:

> Everything the plaintiff is supposed to do is stated in the written contract as something it must do. Then we have this strange reference to the certain contour lines in the diagram as being the final grade. I can think of lots of reasons why a party assigning certain duties to one contractor would include contour lines that are other people's responsibilities. There may be many reasons why a contractor would need to see the big picture to know what it is, to know what the final lines are. And it seems to me that the only logical conclusion is that the only things that the plaintiff had to do were those things stated affirmatively as its tasks.

¶8 We agree with the trial court. The legend on the drawing is not phrased as a directive to the contractor. The trial court correctly noted, "[W]hile there is a reference to filling, there is no reference to excavation, and I do not

believe it can be inferred from some reference to a diagram." In addition, an addendum to the contract provides: "All engineered fill is to be left twelve inches (12") lower than grades shown on Grading Plan No. 5." This addendum supports the conclusion that the contractor's responsibility ended when fill that was hauled to the site brought the level of the excavated cavities to one foot lower than the finished grade.

¶9 Milwaukee County attempts to support its argument that the contract was unambiguous by citing to the extrinsic evidence it submitted at trial.[2] We conclude, however, that the evidence supports the jury's verdict. Milwaukee County incorrectly asserts that "SCS presented no evidence as to what other contractor was responsible for [grading]." Ronald Retzer Sr., one of the contractor's witnesses, testified that "grading and excavation" were part of the general contractor's agreement with the County. In addition, the contractor had successfully bid on other pool-demolition projects in Milwaukee County. A comparison between the contract in this case and other similar pool-demolition contracts between the parties reveals that excavation work was not part of the contract at issue. Thus, a contract between Milwaukee County and the contractor for the demolition of a different swimming pool area, unlike the contract in this case, included specifications regarding stripping topsoil, excavation, and rough grading.

[2] Milwaukee County does not argue that the jury erroneously interpreted the extrinsic evidence presented at trial. Rather, it argues, "there is but one clear and unmistakable reading of the earthwork portion of the contract, for which no extrinsic evidence is needed." Since the County attempts to support its argument with extrinsic evidence, and to assure that we have sufficiently considered the County's claim, we also address whether the evidence supports the jury's verdict.

2. Bad faith.

¶10 Milwaukee County next argues that there is not sufficient evidence to support the jury verdict that the County breached the contract in bad faith. We will not overturn a verdict unless, after considering all the credible evidence, and all the reasonable inferences that can be drawn from that evidence, in the light most favorable to the verdict, there is no credible evidence to sustain the challenged finding. *See* WIS. STAT. § 805.14(1) (1999-00); ***Kuklinski v. Rodriguez***, 203 Wis. 2d 324, 331, 552 N.W.2d 869, 872 (Ct. App. 1996).[3]

¶11 The record is replete with evidence from which the jury could have found bad faith on the part of Milwaukee County. The County did not mention the hill in a meeting to review the progress of the job in April 1996, but fired the contractor for its refusal to excavate the hill in June. The County refused to process a $31,500.00 draw request for work already completed by the contractor. The County threatened the contractor with a trespassing violation if its workers entered the site. The County hired another company to finish the work without getting an estimate or competing quotes from other companies. Although the contractor's bid price for the entire project was $80,800.00, the County paid the other company $127,891.78 to finish the work, not only the work on which the contractor admittedly bid but also the work for which the contractor disclaimed responsibility. Based on the overwhelming evidence of bad faith, the trial court was warranted in giving to the jury a verdict question inquiring as to this issue.

[3] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶12 The County also asserts that the trial court improperly instructed the jury regarding bad faith. In its post-verdict motion, the County argued that the language of the jury instruction was improper. The trial court denied the motion stating:

> I'm satisfied there was sufficient evidence to support the jury's answer to the question. If this is a challenge to the way in which the jury was instructed, then I think it's too late unless I missed something and these issues were raised earlier….I think that the county's waived any right to challenge the jury instructions at this point.

¶13 As noted, the County did not object to the specific language of the jury instruction. Therefore, we agree with the trial court that the County has waived its objection. *See* WIS. STAT. § 805.13(3) ("Failure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict.").

3. Attorneys' fees for contractor's defense of bonding company.

¶14 Milwaukee County next claims that the trial court erred by awarding attorneys' fees to the contractor. The contractor sought recovery of attorneys' fees totaling over $46,000.00. This amount included the $7,840.92 that was paid by the contractor to indemnify its bonding company, Gulf Insurance, which Milwaukee County sued for damages related to this action. The trial court granted only those attorneys' fees paid to indemnify the bonding company and denied the contractor's request for its actual attorneys' fees in pursuing this action. Whether attorneys' fees are recoverable is a question of law that we review *de novo*. ***Elliott v. Donahue***, 169 Wis. 2d 310, 316, 485 N.W.2d 403, 405 (1992); ***Edwards v. Petrone***, 160 Wis. 2d 255, 258, 465 N.W.2d 847, 848 (Ct. App. 1990). We are

satisfied that the trial court's award to the contractor for indemnifying its bonding company was proper.

¶15 Both the contract and common law support the trial court's awarding of attorneys' fees. While costs and expenses of litigation are generally not recoverable, *see* ***Meas v. Young***, 142 Wis. 2d 95, 102, 417 N.W.2d 55, 57 (Ct. App. 1987), such costs may be recovered "where the wrongful acts of the defendant have involved the plaintiff in litigation with others, or placed him in such relation with others as to make it necessary to incur expenses to protect his interest." ***Id.*** Here, the contractor and its bonding company had a "General Agreement of Indemnity," requiring the contractor to reimburse the bonding company for legal expenses incurred by the bonding company. In addition, the jury found that Milwaukee County breached the contract in bad faith. Therefore, the trial court correctly determined that, "the plaintiff is entitled to the attorneys' fees requested for the costs relating to that litigation."

¶16 Moreover, the agreement between the contractor and Milwaukee County provides that if the contractor is terminated without cause, it shall be paid "for all claims, costs, losses and damages incurred in settlement of terminated contracts with Subcontractors, Suppliers and others." The contract further provides that "[w]henever reference is made to 'claims, costs, losses and damages,' it shall include in each case, but not be limited to, all fees and charges of … attorneys and other professionals." Here, the jury found that Milwaukee County terminated the contractor without cause, and, under the terms of the contract, "claims, costs, losses and damages" includes attorneys' fees. Therefore, the trial court properly awarded attorneys' fees to the contractor for its defense of the bonding company.

4. Interest.

¶17 Finally, the County claims that the trial court erred by awarding interest on the second draw to the contractor, arguing that the contractor waived its right to contractual interest pursuant to a "a full and complete settlement for $31,500." During an in-chambers conference, the contractor's attorney submitted a revised verdict form that would have damage questions answered by the court. The County's attorney suggested that having the trial court fill in these figures amounted to a settlement, stating: "See, the problem is it makes it look like those dollars are dependent on a finding of breach and they're no longer – that's no longer the case. I've agreed to pay them, that's a settlement." The trial court responded:

> This isn't about settlements, this is about damages, and if you're objecting to the Court answering these questions since no one broke this down in their pre-trial verdict forms, and given the hour here and Friday afternoon, I'm not inclined to try to do this.
>
> I don't see any compelling need to do it, but I can only answer the question, by the Court –

Milwaukee County's lawyer then replied, "Okay." The trial court reflected on these comments when rendering its decision denying the County's post-verdict motion: "I made it clear this wasn't about settlements. It was about damages and how these were to be submitted to the jury. There was no stipulation settling this aspect of the claim."

¶18 The trial court did not err in awarding prejudgment interest to the contractor. The contract specifically provided for interest on monies due and owing the contractor: "Payments due and unpaid under the contract Documents shall bear interest from the date payment is due at the rate specified in [W]isconsin Statute[] 71.82(1)(a) compounded monthly." Accordingly, we affirm on the appeal.

B. The cross-appeal

¶19 The sole issue of the cross-appeal is whether the trial court erred by denying the contractor's request for its actual attorneys' fees in pursuing this action. As noted, the question of whether attorneys' fees are recoverable is a question of law that we review *de novo*.

> Wisconsin follows the "American Rule," under which parties are generally responsible for their own attorney fees. Under this rule, "with the exception of those attorneys' fees incurred in third-party litigation caused by the party against whom the fees are sought, attorneys' fees may not be awarded unless authorized by statute or by a contract between the parties."

Hunzinger Const. Co. v. Granite Resources Corp., 196 Wis. 2d 327, 338, 538 N.W.2d 804, 809 (Ct. App. 1995) (quoted sources omitted). Here, the parties dispute whether their contract authorized the award of actual attorneys' fees to the contractor. As noted, construction of a contract, including the determination of whether a contract's language is ambiguous, is a question that we review *de novo*. ***Borchardt***, 156 Wis. 2d at 427, 456 N.W.2d at 656. The trial court determined that an award of actual attorneys' fees was not warranted because the contract makes only a "vague reference" to attorneys' fees. We conclude that the trial court properly refused to award the full attorneys' fees to the contractor.

¶20 We agree with the trial court that the contract language did not clearly provide attorneys' fees to a contractor seeking to enforce the contract. Contractual language is ambiguous only when it is "reasonably or fairly susceptible of more than one construction." ***Id.*** 156 Wis. 2d at 420, 456 N.W.2d at 656. As noted, the contract between the County and the contractor provides that if the contractor is terminated without cause, it shall be paid "for all claims, costs, losses and damages incurred in settlement of terminated contracts with Subcontractors, Suppliers and *others*." (Emphasis added.) The contractor contends that the term "others" is ambiguous, and includes Milwaukee County because ambiguity in a contract must be construed against the drafter. ***Goebel v. First Fed. Sav. & Loan Ass'n***, 83 Wis. 2d 668, 675, 266 N.W.2d 352, 356 (1978). The fact that the term "others" is ambiguous, however, is precisely the reason these fees were correctly denied to the contractor. *See* ***Hunzinger***, 196 Wis. 2d at 340, 538 N.W.2d at 809. ("[W]e will not construe an obligation to pay attorneys' fees contrary to the American Rule unless the contract provision *clearly and unambiguously* so provides.") (emphasis added). Moreover, the terms "Subcontractors, Suppliers and others" should be read *in pari materia*. Subcontractors and suppliers are third parties. Taken within this context, we conclude the word "others" also means "third parties." Additionally, Milwaukee County is referred to as "owner" throughout the contract, and another provision gives the contractor the ability to recover attorneys' fees if the "owner fails for thirty days to pay contractor any sum finally determined to be due." (Uppercasing omitted.) Accordingly, we reject the contractor's cross-appeal claim for actual attorneys' fees.

By the Court.—Judgment affirmed.

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