COURT OF APPEALS
DECISION
DATED AND FILED

October 10, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP1044 **Cir. Ct. No. 2003CV8358**

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

BRUCE LARSON,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

PURSUANT TECHNOLOGIES, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: DENNIS P. MORONEY, Judge. *Affirmed in part; reversed in part and cause remanded.*

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

¶1 KESSLER, J. Bruce Larson (Larson) made a loan to Pursuant Technologies, Inc. (Pursuant), pursuant to a "Convertible Promissory Note." Pursuant did not repay the Note when due. The trial court entered judgment

against Pursuant for the full amount due on the Note together with statutory costs and attorney fees for which there was a specific provision in the Note. Pursuant appealed the full amount of the judgment. In the Note, Pursuant also agreed to indemnify Larson for "all losses … resulting from … the breach." Larson requested reimbursement of the court filing fee and compensation for his lost time spent attempting to collect the debt. The trial court found that Larson had not sufficiently established the wage loss claim, that lost wages were not specifically provided for in the indemnification clause, and that Larson could not establish that he had personally paid the filing fee. Consequently, those requests were denied. Larson cross appealed. Pursuant concedes that the filing fee is included in costs allowed to the prevailing party, and never addresses Larson's arguments on appeal regarding the filing fee. Larson also moved for a finding that Pursuant's appeal was frivolous.

¶2 We affirm the judgment against Pursuant and the trial court's denial of Larson's claim for lost wages. We reverse the trial court's refusal to allow the filing fee as a cost. We also determine that Pursuant's appeal was frivolous.

BACKGROUND

¶3 On May 9, 2002, pursuant to a Convertible Promissory Note (the Note) signed by both Larson and Pursuant, Larson loaned Pursuant fifty thousand dollars ($50,000). The Note required repayment of the principal on or before May 8, 2003, with accrued interest at the rate of ten percent (10%) per year. Pursuant paid nothing on or before May 8, 2003.

¶4 The Note provided that after May 8, 2003, interest would accrue at "the highest amount allowed by law." The Note was governed by Texas law and the parties stipulated that the Texas interest rate to be applied "on matured, unpaid

amounts" after May 8, 2003, was eighteen percent (18%) per year. The trial court found that under the terms of the Note, beginning May 9, 2003, interest accrued at the rate of 18% on fifty-five thousand dollars ($55,000), which was the total of the unpaid principal ($50,000) and the unpaid interest at 10% ($5000) as of May 8, 2003.

¶5 The Note provided for conversion of the debt to stock in Pursuant as an alternative method of payment. Larson "in his sole discretion," had the right to waive repayment in cash and elect to take stock in Pursuant for "the balance of the outstanding obligation." Conversion of the debt to stock was to occur under the lower rate of either $3.00 per share, or "any other offering made by [Pursuant]" to sell stock within a particular time. There were additional provisions for warrants, enabling the holder to purchase additional shares of stock in the future, to be included in the conversion.[1]

¶6 After failing to pay the Note when due, Pursuant wrote to Larson on May 27, 2003, asking him to "convert your $50,000 convertible note due 5/8/2003 at $.80 per share for both the face amount and accrued interest (10% from May 9, 2002 to 6/1/2003)." This proposal by Pursuant ignored the post-May 9, 2003 interest rate increase under the Note. Larson responded by email telling Pursuant, "[a]s far as converting the note, I will reluctantly go along with it. However, per its terms, the interest due from and including May 9th, is to be at 18%, the maximum allowed by Texas law…. Please adjust the conversion figures accordingly." For months, Pursuant did not respond to Larson's communication.

[1] There has been no argument presented relative to the terms and conditions of the warrants. Consequently, the warrants will not be discussed further.

Apparently, Pursuant was experiencing considerable financial difficulties during this time.

¶7 On September 17, 2003, Pursuant mailed Larson a "Conversion Agreement" which was essentially backdated to May 8, 2003,[2] used a conversion rate of one dollar per share of stock, and again applied only the pre-May 8, 2003 interest rate of ten percent.[3] Larson did not accept this proposal and began suit on the Note. Pursuant testified that it accepted Larson's May 30 terms, and explained that a mistake by its lawyers caused the discrepancies between the September 17, 2003 Conversion Agreement and Larson's May 30 offer.

¶8 The trial court found that Pursuant had not paid the amount due on or before May 8, 2003, and that from May 9, 2003 forward interest on $55,000 was due at 18% per year. The trial court found that the May 27, 2003 letter from Pursuant was an attempt to change the terms of conversion previously agreed to under the Note. The trial court concluded that under the Note, Larson had the sole discretion and authority to decide whether or not to accept stock in lieu of cash. The trial court found that Pursuant's September delivery of the Conversion Agreement was an attempt "to have this reverted back to the situation that existed as of May 8th, which would have then not incorporated [Larson's] 18 percent factor" and that this attempt by Pursuant was "completely contrary to that which [Larson] had previously said to [Pursuant], what he would be willing to do in his May 30th [email]."

[2] The September "Conversion Agreement" referred to "being entered into effective as of May 8, 2003."

[3] By September 17, 2003, an additional $3156 was due based on interest at 18% on the May 9th balance due.

¶9 The trial court concluded that Larson was entitled to a money judgment on the Note, including "his costs and disbursements as allowed by law" and, "pursuant to the convertible note there is a right for attorney's fees." The trial court found that Larson's lost time pursuing this litigation was not compensable under the Note. In the Order for Judgment, the trial court computed simple interest at 18% per year on the $55,000, beginning May 9, 2003 until November 5, 2004, when the trial court made its decision. The additional interest totaled $14,890.68. Attorney fees of $9,993.85 and costs advanced by Larson's attorney in the amount of $147.35 were also ordered awarded pursuant to specific language in the Note. The trial court did not allow Larson to be reimbursed for the $256 filing fee and denied his claim for $4002 in wages lost while pursuing payment on the Note. Interest was to run at the statutory judgment rate of twelve percent until paid.

STANDARD OF REVIEW

¶10 Findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17(2); ***Richards v. Land Star Group, Inc.***, 224 Wis. 2d 829, 846, 593 N.W.2d 103 (1999). "When mixed questions of law and fact are presented to this court, there are really two component questions which must be answered. ***Snyder v. Badgerland Mobile Homes, Inc.***, 2003 WI App 49, ¶21, 260 Wis. 2d 770, 659 N.W.2d 887. "The first question is what, in fact, actually happened; the second question is whether those facts, as a matter of law, have meaning as a particular legal concept." ***Id.*** The meaning of an unambiguous contract is a question of law which we review *de novo*. ***Rasmussen v. Blue Cross/Blue Shield, United of Wis., Inc.***, 2000 WI App 220, ¶5, 239 Wis. 2d 120, 619 N.W.2d 147. "The drawing of an inference on undisputed facts when more than one inference is possible is a finding of fact which is binding upon the appellate court." ***State v. Friday***, 147

Wis. 2d 359, 370-71, 434 N.W.2d 85 (1989). "It is not within the province of any appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is a reasonable one." ***Id.***

DISCUSSION

¶11 Pursuant argues that it "granted" an option to acquire its stock, that Larson "exercised" the option, and that "exercise" bars Larson from now demanding money repayment of the obligation under the Note. Pursuant's officer testified at trial that Larson's May 30 email, which insisted on the full 18% interest, was not disputed[4] by Pursuant. Thus, Pursuant argues their acquiescence created a binding "option contract." The validity of that position turns on whether there was a contract as to the terms and conditions of the asserted "option" to acquire stock. To make that determination we begin by analyzing the Note.

The Note

¶12 The essential elements of contract formation are offer, acceptance and consideration. ***Briggs v. Miller***, 176 Wis. 321, 325, 186 N.W. 163 (1922). "A contract is based on a mutual meeting of the minds as to terms, manifested by mutual assent." ***Goossen v. Estate of Standaert***, 189 Wis. 2d 237, 246, 525 N.W.2d 314 (Ct. App. 1994). "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. "We presume the parties' intent is evidenced by the words they choose, if those

[4] Pursuant offers no evidence that Pursuant ever told Larson, in writing or otherwise, that his terms were accepted.

words are unambiguous." ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. The Wisconsin Supreme Court has recently noted that:

> Certainty of contract terms and definiteness require mutual assent by way of a meeting of the minds. This court has concluded that there need not be a literal meeting of the minds because "mutual assent is judged by an objective standard." The question is whether there is sufficient evidence to ascertain the intent of the parties; this court examines both the wording of the contract as well as the surrounding circumstances in an attempt to discern the parties' intent.

Metropolitan Ventures, LLC v. GEA Assocs., 2006 WI 71, ¶24, ___ Wis. 2d ___, 717 N.W.2d 58 (citations omitted). All of the elements of a contract exist as to the Note. The Note demonstrates an offer by Larson to loan money to Pursuant in consideration of Pursuant's promise to repay on the conditions set forth in the Note. The consideration was the $50,000 Larson actually delivered to Pursuant. The signature of both parties establishes their mutual acceptance of the terms set forth in the Note. ***Nauga, Inc. v. Westel Milwaukee Co., Inc.***, 216 Wis. 2d 306, 315, 576 N.W.2d 573 (Ct. App. 1998) (noting that the "execution of an unambiguous written contract establishes an enforceable 'meeting of the minds' as a matter of law").

¶13 Larson performed his obligation under the Note when he provided the money. Pursuant never performed its obligation because it never repaid the debt. The trial court found that Pursuant thereby breached the contract. However, Pursuant argues that because Larson agreed to accept a conversion of the debt to stock,[5] and Pursuant later delivered Conversion Documents, it did not breach the

[5] This is apparently the conduct to which Pursuant refers when it argues that Larson "exercised" an "option" contract.

terms of the Convertible Note and Larson is, thus, not entitled to a money judgment.

¶14 We begin by examining the language of the Note. The specific relevant provisions are:

> 7. Annual Interest Rate: 10% (TEN PERCENT)
>
> 9. Annual Interest **Rate** on Matured, Unpaid Amounts: **HIGHEST AMOUNT BY LAW** [18%]
>
> 10. Terms of Payment: **The unpaid principal and accrued interest of this note is due and payable, in full, on or before May 8, 2003.** [Pursuant] promises to pay to the order of [Larson] … according to the terms of payment the principal amount plus interest at the rates stated above. No prepayment penalty shall be imposed.
>
> 11. Alternative Payment Terms/Conversion Feature:
>
> > a. *Conversion Terms*. [Pursuant and Larson] acknowledge and agree that in lieu of [Pursuant] satisfying the payment obligations set forth in Section 9 herein, [Larson] may (in his sole discretion) waive repayment in cash (in whole or in part) and elect to have [Pursuant] convert the outstanding obligation represented by this Note to equity in [Pursuant], in accordance with the following terms and conditions: The balance of the outstanding obligation may be converted to shares of [Pursuant's] $1.00/share par value Common Stock at a conversion rate equal to the lower of (i) $3.00 per share … or (ii) any other offering made by [Pursuant] … to any third party not already an equity owner in [Pursuant]. If [Larson] elects the conversion feature provided by this Section … [Larson] agrees to notify [Pursuant] in writing of such election on or before May 8, 2003, or [Pursuant] may refuse to honor the conversion election.…
> >
> > b. *Issuance of Certificates*. All parties hereto agree that if [Larson] elects the conversion feature … certificates representing the Shares will be issued promptly by [Pursuant].

(Bolding, italicizing and capitalization as in original; underlining added.)

a. The conversion provision

¶15 The terms of the Note allowed Larson, "on or before May 8, 2003," "in his sole discretion" to convert "[t]he balance of the outstanding obligation" to stock and warrants under terms described in the Note. If Larson did not timely make this election, Pursuant could "refuse to honor the conversion election." Larson did not exercise the conversion right under the contract because he did not make the election or give the required notice before May 8, 2003.

¶16 After May 8, 2003, to effect a conversion of the debt to stock, the parties would have to agree to all details necessary to exchange debt for stock. These terms include at least: (1) the amount of debt, including both principal and interest to be included in the conversion; (2) the dollar value to be applied to each share of stock and each warrant for purposes of the conversion; and (3) the date the conversion is to occur and stock is to be issued.

¶17 On May 27, 2003, at a time when Pursuant knew from the terms of the Note that it had already breached the contract by not paying and that the time during which Larson could compel conversion of debt to stock had expired, Pursuant made a new offer. Pursuant proposed that Larson agree to convert a debt of $50,000, plus interest at 10% from May 9, 2002 to June 1, 2003, and to value the stock at $.80 per share in exchange for the debt. This was an offer by Pursuant for a new contract.

¶18 Larson did not accept Pursuant's new offer. Instead, on May 30, 2003, Larson offered to accept stock in lieu of cash but only if the interest from May 9, 2003 ran at the rate of 18% per year. Pursuant never gave Larson any indication that it accepted his offer. Instead, Pursuant made a third proposal in the form of a proposed Conversion Agreement which it mailed to Larson on or about

September 17, 2003. This document had an effective date of May 8, 2003, calculated the debt due on that date, and valued the stock at $1.00 per share. Not only did Pursuant's new proposal contain no mention of the post-May 8 interest at 18% to which Larson was entitled under the Note, but it also contained a release of Larson's rights to principal or interest under the Note. Larson never accepted this offer. There was no agreement as to the terms of the conversion; hence, there was no separate contract to convert the debt to stock.

¶19 The trial court concluded that no agreement on the terms of conversion was ever reached. The record supports that conclusion. There was no new contract to exchange the debt for stock because there was no meeting of the minds as to the terms and conditions under which debt under the Note would be converted to stock. To borrow Pursuant's language, no "option" was ever "granted" because the terms were never agreed upon. Thus, Larson never "exercised" rights under an option contract.

b. The indemnification provisions

¶20 The Note contains indemnification provisions pursuant to which the trial court awarded attorney fees and some court costs to Larson, and denied other costs and Larson's claim for lost wages. The relevant language in the Note provides:

> [Pursuant] hereby agrees to indemnify, defend and hold harmless [Larson] … from any and all losses, claims, damages, liabilities, expenses (including attorneys' fees, court costs, expenses and/or disbursements) … arising out of or resulting from the untruth of any representation herein or the breach of any warranty or covenant….

¶21 A portion of the judgment appealed from includes the award of attorney fees and costs pursuant to the Note. The Order for Judgment includes

$9,993.85 for attorney fees and $147.35 as costs advanced by the attorney. These amounts are included in the $82,743 judgment identified in Pursuant's notice of appeal. Pursuant makes no argument with respect to these items. In fact, counsel for Pursuant stipulated that the Note authorizes recovery of attorney fees and stipulated to the reasonableness of the request submitted. We agree that the plain language of the Note includes these items. By stipulating to these items before the trial court, we consider objection to these specific awards waived. *See* ***Auer Park Corp., Inc. v. Derynda***, 230 Wis. 2d 317, 322-23, 601 N.W.2d 841 (Ct. App. 1999) ("A party to a civil case waives the right to appeal if he or she consents or stipulates to the entry of a judgment. A party cannot complain about an act to which he or she deliberately consents."); ***Agnew v. Baldwin***, 136 Wis. 263, 267, 116 N.W. 641 (1908) (holding that a party who voluntarily stipulates that a certain judgment be entered, cannot later complain of the act to which he deliberately consented—"Consensus tollit errorem").

¶22 Larson sought to recover the filing fee of $256.50 paid to the clerk to commence the action. Pursuant objected to this fee, arguing that it was paid by a corporation, which apparently is also solely owned by Larson. The trial court refused to award Larson any court costs that he had not personally paid. We are aware of no requirement of personal payment which limits the rights of a party to recover statutory costs. *See* WIS. STAT. ch. 814.[6] Such a limitation would be inconsistent with awarding the attorney for the party similarly authorized statutory costs which the attorney or the law firm paid on the client's, Larson's, behalf. Pursuant concedes that the filing fee is a proper recoverable cost and does not

[6] *See, e.g.*, WIS. STAT. § 814.01(1): "**Costs allowed to plaintiff. (1)** Except as otherwise provided in this chapter, costs shall be allowed of course to the plaintiff upon a recovery."

argue the issue on appeal. "Respondents on appeal cannot complain if propositions of appellants are taken as confessed which they do not undertake to refute." ***Charolais Breeding Ranches, Ltd. v. FPC Securities Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (quoting ***State ex rel. Blank v. Gramling***, 219 Wis. 196, 199, 262 N.W. 614 (1935)). Consequently, we reverse the judgment as to the filing fee and direct the clerk to modify the judgment accordingly.

¶23 Larson also made a claim for $4002 in lost wages which he attributed to the time he spent attempting to get Pursuant to pay its debt, including time devoted to the litigation. The trial court concluded that Larson did not provide "sufficient information" to establish the claim. Larson did not testify about his lost wage claim at any time during the trial. At a post trial hearing on the requests for costs, Larson did not attend and did not testify. An appellate court will not interfere with a factfinder's weighing of the evidence. *See* ***Johnson v. Merta***, 95 Wis. 2d 141, 151, 289 N.W.2d 813 (1980). Nor will an appellate court reject an inference drawn by a factfinder when the inference drawn is a reasonable one. *See* ***Friday***, 147 Wis. 2d at 370-71. Because we accept the trial court's evaluation of the evidence, and its insufficiency, we need not discuss the question of whether lost wages were included as recoverable costs in the Note. *See* ***B & D Contractors, Inc. v. Arwin Window Sys., Inc.***, 2006 WI App 123, ¶4, ___Wis. 2d ___, 718 N.W.2d 256 (citing ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938)) (only dispositive issues need be addressed).

Frivolousness

¶24 Larson has moved the court for a finding that Pursuant's appeal is frivolous, and for an award of costs and fees associated with defending the appeal.

"Sanctions for a frivolous appeal will be imposed if the court concludes that the 'party or party's attorney knew, or should have known, that the appeal … [had no] reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.'" ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621 (citing WIS. STAT. RULE 809.25(3)(c)). Larson argues that the appeal should be found frivolous because "Pursuant does not promote an extension, modification or reversal of existing contract law [but i]nstead, it purports to rely upon existing law. In so doing, however, Pursuant twists the fact of record and the trial court's findings so that the existing law it cites appears to be applicable." Pursuant argues that it "interprets the decision of the trial court [as holding that] the optionee under an option contract can revoke an exercise of the option prior to the time the optioner performs." Pursuant appears to be arguing that since it had never performed under the contract before the May 30th email from Larson saying he would reluctantly take the stock, Larson's agreement was an exercise of his "option" contained in the original promissory note. Pursuant, perhaps understanding the weakness of its theory, further notes that an argument is not frivolous just because it is unsuccessful, ***Baumeister v. Automated Products, Inc.***, 2004 WI 148, ¶28, 277 Wis. 2d 21, 690 N.W.2d 1, and that a court of appeals approaches claims for frivolous appeals very seriously, finding such claims to be "an especially delicate area since it is here that ingenuity, foresightedness and competency of the bar must be encouraged and not stifled." ***Id.***, ¶26.

¶25 At the hearing, the trial court stated that it found that Larson had the "sole option at any time to decide how he was going to get paid or not paid or to how he wanted, it cash or awards." Pursuant appears to rest its theory on appeal on this sentence, and the trial court's use of the term "option," and argues that this shows that there was an option contract and therefore, when Larson said, nineteen days after the end of the term of the promissory note, that he would reluctantly accept stock but that the information regarding interest due was incorrect and that would have to be resolved, Larson had exercised his option. Larson argues that the trial court's use of the word "option" related to Larson's choice to accept or reject the new offer by Pursuant in its May 27th letter and then September 17th documents, and the trial court was not referring to Larson exercising his option that had been contained in the original, expired contract. Larson refers to the preceding pages of the transcript, where the trial court states:

> Larson responded to the May 27th letter from Mr. Moreau from Pursuant to him whereby they are attempting to change the deal somewhat and now attempting to basically have them control the convertible note aspects when the whole convertible note aspect really is in Larson's hands. They lost any kind of relationship as far as that concerns after they missed the payments. Everything is in his [Larson's] whole discretion at that juncture.

The trial court then goes on to discuss how there was no communication from Pursuant for months, and how Pursuant's September communication/documents completely disregard Larson's May 30 demands regarding in what form and for what amount he would accept stock in lieu of the money owed to him by Pursuant. Larson argues that when taken in totality, the trial court was referring to Larson's ability to decide whether to take stock or cash, not whether he was exercising an option based on an option contract.

¶26 We determined that, under the terms of the contract, no conversion right was exercised because no action was taken by Larson during the term of the contract (May 9, 2002 through May 8, 2003) to exercise any right to convert the debt owed to him by Pursuant into stock or warrants, and that Larson's right to do so was his solely and that the right expired on May 8, 2003. We concluded that the May 27th letter from Pursuant to Larson asking him to convert the debt to stock was a new offer, which was never accepted. Pursuant's attempt to recraft the contract between the parties as an option contract, based on the trial court's statement that it was Larson's "sole option," has no basis in the reality that by the unambiguous terms of the contract, any option which Larson may have had under the promissory note had expired three weeks before his May 30th email.

¶27 Whether an appeal is frivolous is solely a question of law. ***Howell v. Denomie***, 2005 WI 81, ¶9, 282 Wis. 2d 130, 698 N.W.2d 621. In order to award costs and fees, the court must find that the entire appeal is frivolous. ***Id.*** Pursuant knew or should have known that there was no reasonable basis in law or equity for its use of the "option" as expressed by the trial court. Pursuant also "knew or should have known" that its position "could not be supported by a good faith argument for an extension, modification or reversal of existing law and, in fact, Pursuant never made such an argument. We conclude that Pursuant's appeal in this matter is frivolous and remand this matter to the trial court for a determination as to the appropriate fees and costs due Larson for having to defend this appeal.

CONCLUSION

¶28 We conclude that there is evidence to support the trial court's factual findings, and that the trial court properly interpreted and applied the language of the contract. We further conclude that Pursuant's appeal in this matter is

frivolous. Case remanded with directions to modify the judgment by including the filing fee as an allowable cost and for a determination as to the appropriate fees and costs due Larson for having to defend this appeal. In all other respects, the judgment is affirmed.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

Not recommended for publication in the official reports.