

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 30, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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**Appeal No. 01-1979  
STATE OF WISCONSIN**

**Cir. Ct. No. 99-CV-356**

**IN COURT OF APPEALS  
DISTRICT III**

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**WISCONSIN SEAFOOD COMPANY, INC.,**

**PLAINTIFF-APPELLANT,**

**BJK LTD., LLC,**

**PLAINTIFF,**

**v.**

**DAVID P. FISHER,**

**DEFENDANT-RESPONDENT,**

**ELIZABETH FISHER,**

**NECESSARY-PARTY-RESPONDENT.**

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APPEAL from orders of the circuit court for Brown County:  
WILLIAM M. ATKINSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PETERSON, J. Wisconsin Seafood Company, Inc., appeals an order denying its motion for attorney fees incurred in an arbitration proceeding with David and Elizabeth Fisher (Fisher).<sup>1</sup> Wisconsin Seafood argues that: (1) it was the prevailing party in the arbitration; (2) Fisher's claim for attorney fees was barred by claim preclusion; and (3) the circuit court's award of attorney fees to Fisher constitutes an unauthorized modification of the arbitration award.

¶2 Wisconsin Seafood also appeals an order granting its motion for attorney fees and expenses incurred in enforcing a non-compete agreement. The circuit court awarded \$9,200, approximately \$46,000 less than Wisconsin Seafood requested. Wisconsin Seafood argues that the circuit court erroneously exercised its discretion by limiting the attorney fees to the fees incurred before the preliminary injunction. We disagree and affirm the orders.

## BACKGROUND

¶3 On August 31, 1998, Wisconsin Seafood and Fisher entered into an asset purchase agreement in which Fisher sold his assets to Wisconsin Seafood. Wisconsin Seafood executed a promissory note for \$358,171.57. The promissory note provides for quarterly payments commencing on December 1, 1998, and ending on August 31, 2005. Fisher also executed a non-compete agreement.<sup>2</sup>

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<sup>1</sup> At the time of the sale, David Fisher was president and majority shareholder of Fisher Brothers. Elizabeth Fisher, David's mother, was a 45% shareholder.

<sup>2</sup> The non-compete agreement barred Fisher from engaging in certain competitive practices such as disclosing confidential information and participating in the solicitation or sale of seafood and seafood products to certain specified customers.

¶4 Immediately after the sale, Wisconsin Seafood learned that Fisher was employed by a competitor in violation of the non-compete agreement. As a result, Wisconsin Seafood withheld payment on the installments. Fisher contacted Wisconsin Seafood in an attempt to collect payment. Wisconsin Seafood stated that it intended to exercise its right under section 10.11 of the asset agreement to offset the remaining payments due on the promissory note against damages suffered as a result of Fisher's breach of the non-compete agreement.<sup>3</sup>

¶5 In an attempt to resolve the dispute, Fisher offered to reduce the amount due on the promissory note by \$20,000, the value placed on the non-compete agreement by Wisconsin Seafood at the time of the sale. Wisconsin Seafood did not accept the offer.

¶6 On March 19, 1999, Wisconsin Seafood filed a complaint seeking damages sustained as the result of Fisher's violation of the non-compete agreement. Wisconsin Seafood also sought a preliminary injunction to enforce the non-compete agreement.

#### ARBITRATION

¶7 Wisconsin Seafood's complaint alleged that "[s]tarting on or before September 1, 1998, Wisconsin Seafood learned that Mr. Fisher had violated the Non-Compete Agreement by accepting employment with a competitor ...." The

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<sup>3</sup> Section 10.11 of the asset purchase agreement states in relevant part: "In addition, Purchasers shall have the right of set off against any and all obligations Purchasers owe Seller or Fisher pursuant to the terms and conditions of this Agreement, or documents executed in connection herewith, resulting from: ... (b) any non-fulfillment of any agreement or covenant contained herein ...."

money damages sought were later estimated by Wisconsin Seafood to be approximately \$780,000.

¶8 Fisher filed a motion to compel alternate dispute resolution under section 10.10 J of the asset purchase agreement. The section provides:

Except for such preliminary injunctive relief, arbitration pursuant to this Agreement shall be a condition precedent to the bringing of any action, suit, or proceeding by any party subject to this Agreement, for any form of relief against a party subject to this Agreement arising out of its subject matter or performance rendered or not rendered thereunder.

¶9 The circuit court granted Fischer's motion. It also ordered that Wisconsin Seafood place all installments to be paid under the promissory note in an interest bearing account. The court specifically retained jurisdiction to consider an application for attorney fees by either party in an order dated May 11, 2000.<sup>4</sup>

¶10 Fisher then filed a demand for arbitration. The demand stated the nature of the dispute was "Sale of business/default on a Promissory Note/alleged breach of Non-Competition Agreement." Fisher sought \$358,171.57 plus interest and attorney fees under the promissory note.<sup>5</sup>

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<sup>4</sup> The circuit court also retained jurisdiction to entertain contempt motions for violations of any of the injunction orders and to enforce any arbitration award settlement in the order for judgment.

<sup>5</sup> The promissory note states:

If, in the opinion of the holder of this Note, it becomes necessary to employ counsel to collect or enforce this Note or protect any security given for the same, Maker hereby agrees to pay the holder hereof, in addition to the sums above stated, a reasonable sum as attorneys' fees for such collection and costs of collection, enforcement or protection of any such security.

¶11 Arbitration was conducted on January 23-25, 2001. At the proceeding, Gary Skoog, an expert retained by Wisconsin Seafood, valued the non-compete covenant at approximately \$780,000. The expert retained by Fisher, Steven Bischel, estimated the value to be approximately \$20,000.

¶12 The arbitrator found that Fisher had breached the non-compete agreement and awarded Wisconsin Seafood \$22,286 in damages. Wisconsin Seafood was ordered to pay all monies held in escrow due under the promissory note to Fisher, minus \$22,286. The arbitrator did not award attorney fees.

¶13 Fisher filed a motion for entry of judgment on the arbitration award. Wisconsin Seafood filed a motion for an award of \$164,245.75 in attorney fees incurred in connection with the arbitration. In response, Fisher filed a cross-motion for attorney fees pursuant to section 10.10 of the asset purchase agreement.

¶14 Wisconsin Seafood and Fisher each claimed entitlement to attorney fees as the prevailing party in the arbitration proceeding. The circuit court found that Fisher was the prevailing party and entitled to attorney fees under section 10.10 C and J of the asset purchase agreement.<sup>6</sup> As a result, Wisconsin Seafood's motion for attorney fees was denied.

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<sup>6</sup> Section 10.10 C of the asset purchase agreement states in part:

[T]he parties agree the court may award attorney fees and costs to the prevailing party in any proceeding to enforce this mediation agreement.

Section 10.10 J reads in part:

The prevailing party in any arbitration proceeding pursuant to this paragraph shall be entitled to an award for such party's expenses and said party's actual attorneys' fees incurred in connection therewith.

## NON-COMPETE AGREEMENT

¶15 When it started the lawsuit, Wisconsin Seafood filed a motion for a preliminary injunction based on the non-compete agreement. In response, Fisher stipulated that he would abide by the terms of the non-compete agreement. The stipulation was incorporated into an order dated May 17, 1999.<sup>7</sup> On three separate occasions, Fisher was found in contempt of the injunction. On each occasion, the circuit court assessed attorney fees as a sanction.<sup>8</sup>

¶16 Wisconsin Seafood filed a motion seeking \$55,815 for attorney fees and expenses incurred in the prosecution of the injunction action and subsequent contempt proceedings. The motion was based on section 4.D of the non-compete covenant: “In the event of any breach, Fisher and Fisher Bros. further agree to pay Purchaser all reasonable attorneys’ fees, court costs, and litigation expenses incurred by Purchaser in enforcing any provision of the Agreement.”

¶17 The circuit court awarded Wisconsin Seafood \$9,200 for attorney fees incurred before the issuance of the May 17, 1999, preliminary injunction against Fisher. After that injunction, the court conducted numerous hearings on the various contempt allegations. At each of the hearings, the court made determinations whether to impose attorney fees and in what amount. As a result, the court concluded that Wisconsin Seafood was not entitled to additional fees after the preliminary injunction.

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<sup>7</sup> The preliminary injunction was made permanent in the May 11, 2000, order.

<sup>8</sup> The circuit court assessed attorney fees of \$200 on August 18, 1999, \$1,500 on August 24, 2000, and \$500 on January 12, 2001.

## DISCUSSION

### I. ARBITRATION AWARD

¶18 Wisconsin Seafood argues that the circuit court erred by granting attorney fees to Fisher in connection with the arbitration. Rather, Wisconsin Seafood claims it is entitled to \$164,245.75 in attorney fees. Wisconsin Seafood contends that: (1) it was the prevailing party in the arbitration proceeding and is entitled to attorney fees; (2) Fisher's claim for attorney fees is barred by the doctrine of claim preclusion; and (3) the circuit court's award of attorney fees to Fisher constitutes an unauthorized modification of the arbitration award.

#### A. Prevailing Party

¶19 Wisconsin Seafood argues that the circuit court erred by holding that Fisher was the prevailing party in the arbitration. Wisconsin Seafood contends that the arbitrator ruled in its favor on each issue presented for resolution. Therefore, according to Wisconsin Seafood, it was the prevailing party.

¶20 Under Wisconsin law, attorney fees are recoverable only when "expressly allowed by contract or statute." *Borchardt v. Wilk*, 156 Wis. 2d 420, 426, 456 N.W.2d 653 (Ct. App. 1990). Here, the asset purchase agreement provided for attorney fees to the "prevailing party." As we have explained:

The interpretation of a contract is a question of law which we review de novo. Where the terms of a contract are plain and unambiguous, we will construe it as it stands. However, a contract is ambiguous when its terms are reasonably or fairly susceptible of more than one construction. Whether a contract is ambiguous is itself a question of law.

*Id.* at 427 (citations omitted).

¶21 The asset purchase agreement does not define “prevailing party.” BLACK’S LAW DICTIONARY 1188 (6th ed. 1990), defines the term as “[t]he party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention.” To be a prevailing party, it is not necessary that a party must either obtain a judgment in its favor or win the lawsuit in all respects. “[A] party has prevailed if he or she succeeds on any significant issue in litigation which achieves some of the benefit sought by bringing suit.” *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988).

¶22 What was the “main issue” or the “significant issue” in the arbitration? Money. Fisher wanted to collect on the promissory note and wanted to minimize damages on the non-compete agreement. Wisconsin Seafood did not want to pay anything on the promissory note and wanted \$780,000 for Fisher’s violation of the non-compete agreement.

¶23 On the promissory note, Wisconsin Seafood was withholding payment entirely, claiming it should not have to pay anything. Fisher sought to be paid on the note and also sought acceleration of the payments.<sup>9</sup> While the

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<sup>9</sup> The promissory note states:

Should any installment not be paid on the date specified on Exhibit A, and if said default shall continue for ten days without being cured by Maker, interest on the unpaid principal balance shall immediately and without notice commence accruing at a default rate of ten percent.... If default be made in the payment of any sum hereunder, and if said default shall continue for ten days without being cured by Maker, the entire principal balance of this Note with accrued interest shall, at the option of the holder hereof and without presentation, demand, protest or further notice of any kind, all of which are hereby waived, become immediately due and payable.



arbitrator did not grant acceleration, he did conclude that Fisher was entitled to be paid on the note. The award allowed Fisher to collect all payments held in escrow except for the \$22,286 in damages awarded to Wisconsin Seafood for Fischer's breach of the non-compete agreement. Wisconsin Seafood was also ordered to pay all succeeding payments.

¶24 On the non-compete violation, Wisconsin Seafood sought \$780,000. Fisher conceded \$20,000. The arbitrator awarded \$22,286 to be offset against the promissory note.

¶25 Wisconsin Seafood recognized before the arbitration that money was the "main issue." In a letter to Fisher on June 18, 1999, it stated that "the action is expected to result in a determination of liability. Once that is completed, the arbitrators need only determine the amount of the damages caused to Wisconsin Seafood by Mr. Fisher." That is exactly what happened. In the injunction proceedings in circuit court, the court found that Fisher had violated the non-compete agreement. In the arbitration, the parties focused on damages.

¶26 The circuit court saw it the same way. As the court aptly commented, "I'm sure the defense had to walk out smiling after reading that award, and I'm sure the plaintiff had to walk out frowning."

¶27 We agree. Fisher did not prevail completely, but that is not required in order to be the prevailing party. The determining factor is that Fisher achieved significant benefit from the arbitration, particularly when compared to what Wisconsin Seafood sought and received in the arbitration.

## B. Claim Preclusion

¶28 Wisconsin Seafood contends that, because the arbitrator denied its claim for attorney fees, claim preclusion barred relitigation of Fisher's claims for attorney fees in the postarbitration proceedings before the court. The doctrine of claim preclusion is conclusive as to "all matters which were litigated or which might have been litigated" in a prior proceeding. *DePratt v. West Bend Mut. Ins. Co.*, 113 Wis. 2d 306, 310, 334 N.W.2d 883 (1983). Prior proceedings include arbitration. *Dehnart v. Waukesha Brewing Co.*, 21 Wis. 2d 583, 589, 124 N.W.2d 664 (1963).

¶29 Here, Fisher requested attorney fees in arbitration based on the promissory note. The arbitrator did not award attorney fees. Fisher then moved the circuit court for attorney fees as the prevailing party, based on section 10.10 of the asset purchase agreement. In arbitration, neither party requested attorney fees as the prevailing party under section 10.10 of the asset purchase agreement. Thus, the doctrine of claim preclusion does not apply because that issue was not litigated in arbitration. Therefore, we conclude that the award of attorney fees was not barred by claim preclusion.

## C. Unauthorized Modification of the Arbitration Award

¶30 Wisconsin Seafood argues that the circuit court's award of attorney fees in favor of Fisher should be reversed because it amounts to an unauthorized modification of the arbitration award. Wisconsin Seafood contends that the circuit court's award of attorney fees to Fisher after those fees were denied in the arbitration award affects the merits of the award.

¶31 As we stated in the previous section, the arbitrator denied Fisher’s request for attorney fees under the promissory note. The arbitration award neither awarded nor denied attorney fees under section 10.10 of the asset purchase agreement. As a result, the issue of attorney fees under the asset purchase agreement was not determined in arbitration. Further, the circuit court specifically retained jurisdiction to consider an application for an award of attorney fees. Therefore, we conclude that the award of attorney fees in favor of Fisher was not an unauthorized modification of the arbitration award.

## II. NON-COMPETE COVENANT

¶32 Wisconsin Seafood argues that the circuit court erroneously exercised its discretion by limiting the award of attorney fees under the non-compete agreement to \$9,200 rather than \$55,815. Wisconsin Seafood contends that by limiting the award to fees incurred prior to the preliminary injunction hearing, the court ignored Wisconsin Seafood’s contractual right under the non-compete agreement to recover all fees and expenses.

¶33 Section 4.D of the non-compete agreement provides that “in the event of any breach, Fisher and Fisher Bros. further agree to pay Purchaser all reasonable attorneys’ fees, court costs, and litigation expenses incurred by Purchaser in enforcing any provision of the Agreement.” The circuit court held that \$9,200, in addition to the amounts awarded during the contempt hearings of \$200, \$1,500, and \$5,000, was a reasonable amount for attorney fees incurred by Wisconsin Seafood in enforcing the non-compete agreement.

¶34 To the extent a party is entitled to attorney fees, the circuit court has discretion to determine what amount of fees are reasonable in a given case. *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204-05, 496 N.W.2d 57

(1993). The award will not be disturbed on appeal absent an erroneous exercise of discretion. *Id.* at 204. The court properly exercises discretion when it applies the appropriate legal standard to the facts of record and, using a logical reasoning process, draws a conclusion that a reasonable judge could reach. *Id.*

¶35 Wisconsin Seafood's request must be placed in perspective. It claims \$55,815 in attorney fees in a dispute over a non-compete violation valued at \$22,286 by the arbitrator. The circuit court clearly did not consider these fees reasonable. The court reasoned that Wisconsin Seafood had already been awarded reasonable attorney fees for the events occurring after the preliminary injunction. It then determined that Wisconsin Seafood was entitled to an additional \$9,200 in attorney fees for services rendered before the preliminary injunction. Wisconsin Seafood has failed to demonstrate how this exercise of discretion was erroneous.

¶36 Wisconsin Seafood also argues that the circuit court should apply a good faith standard in determining its claim for attorney fees under the non-compete agreement. Wisconsin Seafood contends that the attorney fees it incurred were necessary to effectively represent its interest in the arbitration.

¶37 However, as stated earlier, the non-compete agreement provides that Wisconsin Seafood is to be paid all reasonable attorney fees incurred in enforcing the non-compete agreement. Further, the circuit court has the discretion to determine what amount of fees are reasonable in a given case. *Id.* Therefore, regardless of good faith, the attorney fees must be reasonable.

*By the Court.*—Orders affirmed.

Recommended for publication in the official reports.

No. 01-1979(D)

¶38 HOOVER, P.J. (*dissenting*). While I appreciate the trial court's and the majority's rationale, I would hold that Wisconsin Seafood was the prevailing party in the arbitration proceeding. I therefore respectfully dissent.<sup>10</sup>

¶39 I am convinced that the correct standard for identifying the prevailing party focuses upon the issues litigated, not the size of the award. As Wisconsin Seafood observes, “[b]y focusing on the issues litigated instead of damages awarded, the prevailing party test yields predictable results which is not the case if one adopts the ‘victory’ argument espoused by the Fisher Group ....” Wisconsin Seafood thus alludes to the troublesome question that the majority does not, and I cannot, answer: What is the method of analysis for determining how close a litigant must come to the damages sought to qualify as the prevailing party?

¶40 A party prevails “if he or she succeeds on any significant issue in litigation which achieves some of the benefit sought by bringing suit.” *Footville State Bank v. Harvell*, 146 Wis. 2d 524, 539-40, 432 N.W.2d 122 (Ct. App. 1988). We need not speculate as to what the arbitration was actually concerned with. The Fisher Group initiated the arbitration proceeding. In its “DEMAND FOR ARBITRATION,” it presented two issues for resolution. First, the Fisher

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<sup>10</sup> Because I would conclude that Wisconsin Seafood was the prevailing party, I would not reach its claim preclusion and unauthorized modification of the arbitration award arguments. I agree with the majority's conclusion that the trial court properly exercised its discretion by awarding attorney fees to Wisconsin Seafood under the non-compete agreement.

Group sought a determination whether Wisconsin Seafood had defaulted on the promissory note by withholding installment payments. Second, it asked the arbitrator to determine whether David Fisher breached the non-compete agreement. Thus, the Fisher Group wanted the benefit of a determination that Fisher did not breach his obligation and therefore Wisconsin Seafood was not entitled to withhold payments under the note. It wanted the further benefit of accelerating the balance due on the note, having interest accrue at 10% per year rather than at the 5% rate provided in the agreement, and actual attorney fees.<sup>11</sup>

¶41 Rather than deciding that the Fisher Group prevailed on these issues, the arbitrator concluded that David Fisher violated the non-compete agreement. Thus, not only did the Fisher Group lose on that issue, but also on its contention that Wisconsin Seafood breached the agreement by withholding payments on the note. The Fisher Group framed the issues and it lost. Wisconsin Seafood's position regarding its right to withhold payments was vindicated and damages were awarded. I would therefore hold that it was the prevailing party.

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<sup>11</sup> Wisconsin Seafood contends that the default interest rate would have increased the interest payable by more than \$10,000 a year and that factoring in attorney fees would result in an adverse impact on Wisconsin Seafood in excess of \$100,000.

