COURT OF APPEALS
DECISION
DATED AND FILED

May 4, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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. 02-2919 Cir. Ct. No. 93CV009300

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

JOHN TRENHAILE, D/B/A TRENKO ELECTRIC, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

J.H. FINDORFF & SON, INC., AND ST. PAUL FIRE & MARINE INSURANCE COMPANY,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

DEFENDANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: JOHN A. FRANKE, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*[1]

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

¶1 PER CURIAM. John Trenhaile, d/b/a Trenko Electric, Inc., appeals from an "amended order for judgment and final judgment," concluding that he was not entitled to consequential damages for his breach-of-contract claim. Trenhaile was awarded damages for his breach-of-contract claim following a bench trial, and the defendants, J.H. Findorff & Son, Inc., and the St. Paul Fire & Marine Insurance Company, appealed. We reversed the trial court's damage award and remanded with directions to make specific findings of fact regarding Trenhaile's damages. ***Trenhaile v. J.H. Findorff & Son, Inc.***, No. 96-0385, unpublished slip op. (Wis. Ct. App. Sept. 16, 1997). On remand, the trial court awarded Trenhaile compensatory damages, but determined that he was not entitled to consequential damages because he had not proven that the damages were reasonably foreseeable or reasonably certain to occur. Trenhaile claims that the trial court erred when it: (1) denied his consequential-damages claim; (2) reduced his compensatory damages for incomplete and non-complying work; and (3) determined that Trenhaile had waived his remaining damage claims when he failed to cross-appeal the first trial court's failure to address them. We affirm.

[1] John Trenhaile, d/b/a Trenko Electric, Inc., originally appealed from an "order for judgment and final judgment" entered on September 17, 2002. J.H. Findorff & Son, Inc., and the St. Paul Fire & Marine Insurance Company filed a motion to dismiss the appeal as premature. We denied the motion, concluding that the notice of appeal was timely filed after the entry of the judgment. *See* WIS. STAT. RULE 808.04 (2001–02). On January 3, 2003, the trial court entered an "amended order for judgment and final judgment." It is from this judgment that Trenhaile appeals and Findorff and St. Paul cross-appeal.

¶2 Findorff and St. Paul cross-appeal from the trial court's reinstatement of Trenhaile's damage award for costs and attorney's fees, and unjust enrichment. They claim that the trial court erroneously exercised its discretion when it reinstated the damages because it did not articulate a basis for the post-remand award. We agree and reverse and remand for a hearing to determine if Trenhaile is entitled to costs and attorney's fees and damages for unjust enrichment.

I.

¶3 This case has a long and protracted history. In 1989, J.H. Findorff & Son, Inc., was selected to be the general contractor for a large construction project in the City of Milwaukee. The project consisted of the reconstruction and rehabilitation of two parts of the Jones Island Waste Water Treatment Plant for the Milwaukee Metropolitan Sewerage District. Findorff was required to post bonds on both projects to ensure the payment of its subcontractors and their suppliers. In satisfaction of this requirement, the St. Paul Fire & Marine Insurance Company issued two "Labor and Material Bonds" to the Sewerage District.

¶4 In 1990, Findorff hired Trenko Electric, Inc., to perform electrical work on both projects. John Trenhaile was the president and sole shareholder of Trenko, and, at all times relevant to this case, Trenko was certified as a "small business enterprise." Findorff and Trenko entered into a subcontract in which Findorff would pay Trenko $1,361,971 with an expected completion date of January 1993. The subcontract provided that Trenko would be paid when Findorff received payment from the Sewerage District (a "pay when paid" clause):

> Payments will be made monthly as the work progresses for the value of the completed work as determined by the Contractor, Owner and Architect. Invoices from the

> Subcontractor for progress billings must be in our hands by the 25th of the month and will be paid:
>
> a. Terms: Payment upon receipt of funds from the Owner.
>
> b. Less: A retained percentage of ten percent (10%).
>
> c. Upon compliance with the lien requirements as set forth in paragraph 19.
>
> ….
>
> Notwithstanding anything herebefore contained, it is agreed that Contractor shall not be obligated from time-to-time to pay Subcontractor any larger portion of the subcontract price that the proportion Owner had paid to Contractor in respect to the subcontract work.

(Acronym omitted.)

¶5 In June 1992, Trenko sold most of its business assets to Pieper Electric for $28,000. It had completed approximately ninety percent of the contracted work and had been paid $1,370,000, an amount which was slightly over the original contract price due to change orders, contract adjustments, and extra work. The sale included Trenko's contracts and labor force, including the president, Trenhaile. Trenko continued to work on the projects under the direction of Pieper.

¶6 Approximately one week after the sale to Pieper, three unsecured creditors of Trenko, who were unrelated to the Sewerage District project, initiated an involuntary bankruptcy proceeding against Trenko. In August 1992, Trenko, now working for Pieper, halted its work, forcing Findorff to hire another electrical contactor to finish the projects.

¶7 Trenhaile sued Findorff and St. Paul after the bankruptcy trustee had abandoned any claims against Findorff, alleging, among other things, claims for breach of contract, restitution, and unjust enrichment.[2] Trenhaile later refined his claims against Findorff to include an allegation that Findorff was liable for the "lost going concern value of Trenko" because it caused the bankruptcy.

¶8 Findorff raised several affirmative defenses and counterclaimed against Trenko. Among its counterclaims was the claim that Trenko breached its contract when it failed to finish its work. Findorff thus asserted that it was entitled to offset Trenko's alleged damages for: (1) sums Findorff paid to the Sewerage District and others due to Trenko's allegedly incomplete and noncomplying work; (2) sums Findorff paid to Trenko's union, suppliers, and subcontractors to complete work and clear liens as required by Findorff's labor and materials bond; and (3) sums Findorff paid to replacement subcontractors after Trenko ceased to work on the project.

¶9 The case was tried before the court in late February and early March of 1995. After an eight-day trial, the trial court issued a memorandum decision and order on November 29, 1995. It concluded "the bankruptcy of Trenko was caused in large part by the failure to receive payments from Findorff promptly." It thus awarded Trenhaile $129,597 in compensatory damages for unpaid receivables, $558,532 in consequential damages for Trenko's lost going concern value, and $5,000 dollars in damages for unjust enrichment. The trial court then reduced the compensatory and consequential damages by fifty percent for what it

[2] Trenhaile also sued the Milwaukee Metropolitan Sewerage District. The parties later stipulated to dismiss the Sewerage District.

determined was Trenko's contribution to the delay by submitting "faulty paperwork." The trial court also denied Findorff's claim for offsets and dismissed St. Paul from the lawsuit. It entered judgment for Trenhaile in the amount of $349,064.50 in damages and $12,513.82 in costs and attorney's fees.

¶10 Findorff appealed on all of the issues. Trenhaile cross-appealed on the trial court's reduction of its damages by fifty percent and dismissal of St. Paul. In an unpublished opinion, we affirmed the trial court's finding that Findorff caused Trenko's bankruptcy, but reversed the trial court's damage award because, we found, that the trial court had not made factual findings to entitle Trenhaile to recover future lost profits, had used incorrect damage figures, and had failed to explain why it dismissed St. Paul or denied Findorff's offsets. ***Trenhaile***, No. 96-0385 at 8–13. We then remanded the case to the trial court with directions to:

> (1) make detailed factual findings and determine whether the facts support an award of consequential damages, foreseeability and reasonable certainty; (2) either utilize the damage figures introduced into evidence or make specific findings and conclusions as to why another damage figure is being used; (3) reinstate the surety, St. Paul, and determine what damage, if any the surety must pay; and (4) determine whether and on what legal basis Findorff's offsets and defenses should be denied.

Id. at 13.

¶11 On remand, the trial court determined that there were three issues to be determined: (1) Trenhaile's damage claims; (2) Findorff's offsets; and (3) the extent to which St. Paul was liable on its bond for any damages against Findorff.

It then reviewed the trial transcripts and heard additional testimony.[3] In a thirty-two page written decision, the trial court concluded that Trenhaile was not entitled to damages for lost future profits or the lost future value of Trenko because such damages were not reasonably foreseeable and not proven to a reasonable certainty. It also concluded that: (1) Trenhaile was entitled to damages of $110,327 for unpaid receivables; (2) Findorff was entitled to offsets of $81,018, leaving Trenko with a damages of $29,309; and (3) St. Paul was liable for Trenko's damages under its surety bond.

¶12 Trenhaile twice moved for reconsideration. The trial court denied the first motion to reconsider and entered a final judgment. The trial court granted, in part, the second motion to reconsider, reinstating the $12,513.82 award of costs and attorney's fees, and the $5,000 unjust enrichment award to Trenhaile as the awards were originally set out in the November 1995 judgment. It then entered an "amended order for judgment and final judgment" from which the parties appeal.

II.

A. Appeal

1. Consequential Damages

¶13 Trenhaile first argues that the trial court erred when it denied his claim for consequential damages. The recovery of consequential damages for lost future profits requires three determinations: (1) the defendant's breach of contract

[3] Several proceedings occurred before the remand hearings to determine which trial court judge would decide the case. *See* ***State ex rel. J.H. Findorff & Son, Inc. v. Circuit Ct. for Milwaukee County***, 2000 WI 30, 233 Wis. 2d 428, 608 N.W.2d 679.

must be the proximate cause of the alleged damages; (2) the damages should have been reasonably foreseeable, or within the actual contemplation of the parties at the time they entered into the contract, with the understanding between the parties that the breach of contract would cause the type of lost profit damages being alleged; and (3) any future profits must be proven with "reasonable certainty." 2 THE LAW OF DAMAGES IN WISCONSIN § 26.4 at 26-6 (Russell M. Ware ed., 2d ed. 1995).

¶14 We review a trial court's legal findings *de novo*. *See* ***Block v. Gomez***, 201 Wis. 2d 795, 805, 549 N.W.2d 783, 787 (Ct. App. 1996). We will uphold any factual findings made by the trial court unless they are clearly erroneous. *See* ***Old Republic Sur. Co. v. Erlien***, 190 Wis. 2d 400, 414, 527 N.W.2d 389, 393 (Ct. App. 1994).

¶15 In this case, the first prong—whether Findorff's breach of the contract was the proximate cause of Trenhaile's alleged damages—is not in dispute. The trial court found that Findorff's late payments to Trenko were a substantial cause of Trenko's bankruptcy, and we affirmed that finding in the first appeal. *See* ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234, 238 (1989) ("a decision on a legal issue by an appellate court establishes the law of the case, which must be followed in all subsequent proceedings in the trial court or on later appeal."). We thus turn to the second prong of the analysis—whether Trenko's bankruptcy was reasonably foreseeable.

a. Reasonable Foreseeablilty

¶16 Consequential damages may be awarded for a breach of contract if such damages are reasonably foreseeable at the time the contract was made. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 320–322, 306 N.W.2d

292, 300–301 (Ct. App. 1981). In this case, Trenhaile relied on the expert testimony of Dennis Bersch, an accountant specializing in construction, to establish the likely profits of Trenko over a twelve-year period and to project the value of Trenko at the end of that period.

¶17 As we have seen, the trial court concluded that Trenhaile failed to sustain his burden of proving that Trenko's bankruptcy was a reasonably foreseeable result of Findorff's delay in making payments. Specifically, the trial court found that the delay in making payments:

> relate[s] entirely to the delays in handling 'extras' and change orders, a process that often proceeded by agreements made outside the terms of the written contracts. Findorff's breach was primarily, perhaps entirely, a failure to step in and pay Trenko without waiting for [Milwaukee Metropolitan Sewerage District] to process and approve things.

(Internal references and acronym omitted.) It also found that Findorff was unaware that a delay in payments for extra work and change orders would bankrupt Trenko. It commented that "[i]n late 1991 and early 1992 Trenko made repeated claims that money for work done pursuant to [contract modification initiation requests] and other work done outside of the scope of the contract was long overdue." (Acronym omitted.) The trial court noted that despite these complaints and Trenko's repeated demands for money, none of Trenko's demands "indicated that Trenko would be forced to sell assets or to go out of business if the payment delays persisted." It also pointed out that "Trenko did not give Findorff advance notice of the sale [to Pieper]" and that "Findorff did not expect or anticipate either the transfer of assets to Pieper or the bankruptcy proceedings."

¶18 These findings are supported by the record. At the remand hearing, John Trenhaile, the former owner of Trenco, testified that he did not provide

Findorff with Trenko's tax returns or financial statements and that he "probably didn't" tell Findorff of the sale to Pieper or Trenko's impending bankruptcy. Moreover, Gregory Rizzo, a project manager for Findorff, testified that Trenko never provided Findorff with a financial statement or tax returns. Finally, John Cliffe, another project manager for Findorff, testified that Trenko never provided him with its financial statements or informed him that the business would fail if it did not timely receive payments.

¶19 In light of this testimony, the trial court's findings of fact are not clearly erroneous. The trial court, as the finder of fact and final assessor of the witnesses' credibility, was entitled to believe the testimony set out above. ***Handicapped Children's Educ. Bd. v. Lukaszewski***, 112 Wis. 2d 197, 205, 332 N.W.2d 774, 778 (1983). Moreover, the trial court's legal conclusion, that the deterioration in Trenko's ability to conduct its business was not a reasonably foreseeable result of Findorff's failure to pay Trenko for its extra work and change orders, properly flows from its findings of fact.

¶20 Trenhaile complains that the trial court erred because several factors demonstrate that its bankruptcy was reasonably foreseeable. It first claims that the absence of a consequential-damages clause in the subcontract, when such clauses are now routinely included in construction contracts by the American Institute of Architects, "suggests strongly that such consequential damages, at least in the abstract, are entirely 'foreseeable' by sophisticated general contractors like Findorff." Trenhaile fails to explain, however, how the absence of a consequential-damages clause shows that the specific consequential damages claimed in the case, namely those connected with its bankruptcy, were reasonably foreseeable by Findorff.

¶21 Trenhaile also argues that Findorff, as a "sophisticated general contractor" should have known that its delay in payments was going to cause Trenko's bankruptcy based on "the substantial amounts not paid, the change order work Trenko was forced to perform at a loss, *combined* with Findorff's knowledge of Trenko's small size and capitalization." (Emphasis in original.) This factor, however, was something for the trial court to assess. Trenko's status as a small business enterprise did not as a matter of law alert Findorff to Trenko's financial situation or its impending bankruptcy. Moreover, the trial court found that the amount Findorff owed Trenko was not as clear or substantial at the time of Trenko's bankruptcy as Trenko would have us believe:

> At time of the sale to Pieper, Trenko had been paid a total of 1.37 million on the original contracts and some of the modification orders. On the original contracts and approved modification orders, Trenko was still owed $21,000 on [Northern Utility Pump Station] and $51,000 on East Plant, plus whatever might be due on pending claims and change orders. However, Trenko owed at least $40,000 to unions, subcontractors and suppliers, and significant backcharges were considered by [Milwaukee Metropolitan Sewerage District]. Findorff did not know the amount of the potential liens and the backcharges had not been resolved, but from Findorff's standpoint these offsets might easily turn out to equal or exceed any balance due to Trenko.

(Acronyms omitted.) As we will see in the next section, the trial court's findings that Trenko's damages were not reasonably certain are not clearly erroneous.

b. Reasonable Certainty

¶22 "Damages for lost profits need not be proven with absolute certainty, but the claimant must produce sufficient evidence … on which to base a reasonable inference as to a damage amount." ***Lindevig v. Dairy Equip. Co.***, 150 Wis. 2d 731, 740, 442 N.W.2d 504, 508 (Ct. App. 1989). In attempting to project

future profits, comparisons with other businesses may be included in the projection as long as the comparisons are from a group of businesses with similar performance. *See* ***Kealey Pharm. & Home Care Serv., Inc. v. Walgreen Co.***, 607 F.Supp. 155, 168–169 (W.D. Wis. 1984), *vacated in part on other grounds*, 761 F.2d 345 (7th Cir. 1985).

¶23 As we have seen, Trenhaile relied on Bersch's testimony to establish the likely profits of Trenko over a twelve-year period and to project the value of Trenko at the end of that period. Bersch's testimony suggests that he used Trenko's financial records from the years 1987, 1988, 1990, and 1991 to make his calculations. He then used these calculations to project a ten percent growth rate starting in 1992 and ending in 2004, when Trenhaile planned to retire.

¶24 The trial court found Bersch's analysis "unpersuasive and completely insufficient to establish damages to a 'reasonable certainty'" for several reasons. First, it was troubled by Bersch's use of general industry statistics to show Trenko's damages. It noted that there was no evidence that the businesses used to compile the statistics were similar to Trenko. Second, it had doubts about Bersch's analysis because it found that Bersch only relied on three years of Trenko's operating history, 1988, 1990, and 1991, in some of his calculations and did not use any information from 1989 at all. It commented that this was a "small sample on which to base future projections" and that the exclusion of 1989 was "a clear example of Bersch's inclination to structure a favorable lens through which to view Trenko's future." Finally, the trial court noted that it was "skeptical" about Bersch's "optimism" regarding Trenko's future because Trenko sold some of its assets to Pieper for $28,000 and further noted that:

> [t]he evidence in this case strongly suggests that even aside from Findorff's breach, the [Northern Utility Pump Station]

> and East Plant contracts did not work out well for Trenko; that even had Findorff paid timely and fully, Trenko would have limped rather than sprinted into the future. It is certainly possible that Trenko would have become a more profitable company in the '90's than it had been in the '80's, but the evidence does not support the future profits and value asserted by Bersch and only speculation could establish some other level of future profits.

(Acronym omitted.)

¶25 As noted, when the trial court acts as the fact finder, and where there is conflicting testimony, the trial judge is the ultimate arbiter of witness credibility. Moreover, a fact-finder need not accept the testimony of any witness, expert or lay. *See* ***First Nat'l Bank v. Wernhart***, 204 Wis. 2d 361, 369, 555 N.W.2d 819, 822 (Ct. App. 1996). Timothy Tremel, an expert witness in accounting, testified that he disagreed with Bersch's decision to exclude 1989 from his calculations: "It's a part of the history, the financial history of this company. It's what they did. It's whether or not they made money in any given year. In that year they didn't make any money. They did not have a good year." He also disagreed with Bersch's opinion that Trenko's financial records from 1992 should be excluded:

> Again, this is what happened to this company. This was the financial impact of the actions taken by the owners of the company. They did not make any money that year and they – they are not generating enough gross profit to cover their selling generated expense in their interest of expense.

Tremel further opined that Bersch should have evaluated Trenko based on its own financial merits rather than using industry averages because Trenko's thirteen years of business was "enough time to become established in a marketplace and be able to indicate whether or not you are going to be a successful contractor." According to Tremel, if Bersch had used the actual performance of Trenko instead of industry averages, "there would be no future profits to discount back to present

value" because "the average [profit] over the time span we looked at is 0 or slightly less." The trial court's findings are not clearly erroneous.

¶26 Trenhaile argues that the trial court erred, however, because it confused "lost profits" with "lost business value." This claim is without merit. Trenhaile claims that Bersch's methodology had two components: (1) projected future earnings, discounted to present value; and (2) the terminal or sale value of the business, discounted to present value. Under this methodology, it does not matter if, as Trenhaile claims, the trial court only considered lost profits in its analysis. Trenhaile failed to prove the first part of its claim—lost profits; that is all that is required because the value of a business depends on its ability to produce earnings. *See* ***Plywood Oshkosh, Inc. v. Van's Realty & Constr.***, 80 Wis. 2d 26, 31, 257 N.W.2d 847, 849 (1977) ("The claimant generally has the burden of proving by credible evidence to a reasonable certainty his damage.").

2. Offset Claims

¶27 Next, Trenhaile alleges that the trial court erred when it allowed Findorff to present its offset counterclaims because "Findorff's material breach of contract, and Trenko's *lack* of breach, precluded Findorff's recovery." (Emphasis in original.) Trenhaile misconstrues the law. "[A] material breach by one party may excuse subsequent performance by the other." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 183, 557 N.W.2d 67, 77 (1996). This legal principle does not, however, entitle the party excused from performance to recover damages for expenses saved as a result of the breach.

¶28 "The fundamental idea in allowing damages for breach of contract is to put the plaintiff in as good a position financially as he would have been in but for the breach." ***Schubert v. Midwest Broad. Co.***, 1 Wis. 2d 497, 502, 85 N.W.2d

449, 452 (1957). "If … the [plaintiff] would have incurred expenses and the breach saves those expenses, then the [plaintiff] is entitled only to the agreed compensation less the expenses he has saved." ***Thorp Sales Corp. v. Gyuro Grading Co.***, 111 Wis. 2d 431, 439, 331 N.W.2d 342, 347 (1983).

¶29 Under ***Thorp***, the trial court properly reduced Trenhaile's damages. It implicitly found that the offsets it granted were warranted because Trenhaile had saved the expenses as a result of Findorff's breach. The trial court correctly recognized that Trenhaile was only entitled to be put in as good a position as he would have been in had Findorff performed the contract.

3. Waiver

¶30 Finally, Trenhaile argues that the trial court erred when it determined that several components of his damage claim were waived because he did not cross-appeal the first trial court's failure to rule on them. Again, we disagree.

¶31 At trial, Trenhaile asserted that he was entitled to damages for the following: (1) uncollected receivable balances; (2) work beyond the scope of the contracts; (3) cost overruns; and (4) extended home office overhead due to delay. As we have seen, the trial court originally awarded Trenhaile $129,597 in compensatory damages for unpaid receivables, and $558,532 in consequential damages for Trenko's lost going concern value. The court did not address the last three categories of damages and Trenko did not raise this issue on appeal. On remand, the trial court determined that Trenhaile was foreclosed from arguing the last three types of damages because Trenhaile had waived the issue when he failed to raise it on appeal.

¶32 Trenhaile asserts that the trial court erred because a cross-appeal is not required under ***State v. Alles***, 106 Wis. 2d 368, 316 N.W.2d 378 (1982), when "a respondent simply seeks to correct errors that would support the judgment." Trenhaile's reliance on ***Alles*** is misplaced. ***Alles*** provides that:

> when the error complained of, if corrected, would sustain the judgment, order, or portion thereof appealed from, the respondent by common law is entitled to have review of such claimed error *by raising the issue in its brief* without service of a notice of review or notice of cross-appeal. The reason for this is the accepted appellate court rationale that a respondent's judgment or verdict will not be overturned where the record reveals that the trial court's decision was right, although for the wrong reason.

Id., 106 Wis. 2d at 391, 316 N.W. 2d at 388 (emphasis added). ***Alles*** is clear that, while a respondent is not required to file a notice of cross-appeal if the error complained of would not reverse the judgment, the respondent must raise the issue in its brief. Trenhaile does not claim that he raised the trial court's failure to address part of his claim for damages in his brief on his first appeal. Accordingly, the trial court properly concluded that the issue was waived. *See* ***State v. Killory***, 73 Wis. 2d 400, 409–410, 243 N.W.2d 475, 481–482 (1976).

B. Cross-Appeal

¶33 Findorff alleges that the trial court erroneously exercised its discretion when it reinstated the November 1995 award to Trenhaile of $12,513.82 for costs and attorney's fees, and $5,000 for unjust enrichment. An award of attorney's fees is committed to the sound discretion of the trial court, and we will not reverse absent an erroneous exercise of discretion. ***Village of Shorewood v. Steinberg***, 174 Wis. 2d 191, 204, 496 N.W.2d 57, 62 (1993). The trial court properly exercises its 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. *See* ***id.***

¶34 At a hearing on Trenhaile's second motion for reconsideration, the trial court reinstated the November 1995 award for costs and attorney's fees from the first trial, noting that:

> it's fair to say that … most of the litigation up to the end of the first trial was concerned with [whether Findorff] breach[ed] … the contract.
>
> Of course, much litigation back then concerned the damage issues on which the plaintiff was ultimately unsuccessful, but I'm going to find and exercise the discretion that I have to allow the costs that were originally awarded in the original judgment in this matter of $12,513.82 for the plaintiff.

It did not, however, award either party costs and attorney's fees for the litigation that followed the first trial:

> Since [the first trial], most of the energy in this litigation has been devoted to the issues of the damages on that breach of contract claim and also to other issues on which the plaintiff has ultimately been unsuccessful, and while the plaintiff has ultimately prevailed on some of the issues we have pursued since the first trial, I'm going to find that costs should be awarded to neither party for the litigation since that first judgment was entered, and, therefore, the request for any costs after that point is denied.

The trial court also reinstated Trenhaile's damages for unjust enrichment, concluding that "the most reasonable reading of the Court of Appeals' decision is that this particular claim was not reversed and should be included as a part of the final judgment."

¶35 Findorff claims that the trial court erroneously exercised its discretion because the "entire damages award, including the award of $12,513.82

in costs and the $5,000 as [unjust enrichment], was reversed in Trenko I, the [trial] court should only have granted awards, whether for costs or unjust enrichment, after determining a basis for a post-remand award." (Underlining in original.) We agree. We reversed the entire damage award in the first appeal. *See* ***Trenhaile***, No. 96-0385 at 13. Accordingly, on remand, the trial court was required to make an independent determination on costs and unjust enrichment. That did not occur. Accordingly, we reverse and remand for that purpose.

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

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