COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2295 **Cir. Ct. No. 2007CV1416**

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

APPLETON PAPERS INC.,

PLAINTIFF-RESPONDENT,

V.

ANDRITZ BMB AG AND ANDRITZ INC.,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Outagamie County: JOHN A. DES JARDINS, Judge. *Affirmed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 HOOVER, P.J. Andritz BMB AG and Andritz Inc. (collectively, Andritz) appeal a judgment entered after a jury trial. Andritz primarily disputes whether it granted Appleton Papers Inc. an option to purchase manufacturing equipment and, if so, whether Appleton exercised the option. We reject Andritz's

arguments and answer both questions in the affirmative. We also reject Andritz's arguments that consequential damages were either contractually precluded, unforeseeable, or not caused by the breach. Finally, we reject Andritz's numerous challenges to the jury instructions and verdict questions, and affirm.

BACKGROUND

¶2 Appleton Papers sought to expand its thermal paper operations at an Ohio mill by installing a specially engineered paper coating line. Andritz submitted the lowest bid, and the parties negotiated an agreement in February 2007. The parties' contract was comprised of several documents, including Andritz's 109-page proposal 401'273I, and a letter agreement (the agreement) with an attached eight-page appendix A. The detailed appendix set forth specific design and warranty requirements, a pricing summary, and a work and payment schedule. The agreement provided:

> As we have discussed, Appleton is still working to analyze financing options for the expansion project. Although Appleton is unable to formalize an equipment purchase at this time, it is imperative the financing delay does not slow the overall project timeline. Accordingly, we are authorizing Andritz to proceed with engineering work as outlined below. As part of this authorization, we need to ensure the current proposal will remain available and substantially unchanged for a time frame sufficient to allow Appleton to conclude its assessment of financing options and to also finalize details of a purchase agreement with Andritz.
>
> Accordingly, this letter sets forth the terms and conditions of agreement between Appleton and Andritz related to Proposal 401'273I. ....
>
> 1. Appleton shall provide Andritz a payment of [$1.2 million] upon execution of this Agreement. Such monies shall be utilized to perform engineering services as outlined in Exhibit A.

> 2. For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Andritz hereby grants to Appleton an option to purchase the coater equipment and installation (hereinafter referred to as the "Facility") as more fully described in Appendix A.[, which] shall be incorporated by reference and considered a part of this agreement.
>
> 3. This option to purchase shall commence on the 2nd day of February, 2007 and shall expire ... on the 5th day of March, 2007. If Appleton fails to execute its option prior to ... the 1st day of March, 2007[,] both parties agree to negotiate in good faith regarding an extension to the option, however, Appleton understands and agrees that if the option is not effected by March 5, 2007, the delivery date in Andritz's proposal can no longer be guaranteed and Andritz will have the right to make reasonable adjustment to both the delivery date and price in the Proposal to account for such delay.
>
> 4. Appleton may assign this option to any entity from which Appleton shall then lease the Facility. Any other attempted assignment, delegation, transfer or conveyance of this option to purchase without the other party's express written permission is void.
>
> 5. In the event Appleton timely exercises this option, the engineering payment shall be applied to the ... purchase price for the Facility. If Appleton fails to exercise this option, the engineering payment shall not be refunded, though Appleton shall have rights to utilize all work-product of the engineering services.
>
> 6. This Agreement shall be construed according to [Wisconsin law.]
>
> 7. Other than as specifically provided in this letter agreement, no contract or agreement providing for any matter covered by the Proposal shall be deemed to exist between Appleton and Andritz unless and until Appleton issues a Purchase Order that is accepted by Andritz.
>
> 8. [Limitation of liability provision]

¶3 In a February 21 e-mail, Appleton's Mark Smukowski wrote, "I have good news for the Andritz team; we have completed our financing evaluation and are now in a position to issue an order." Smukowski suggested issuing a letter

of intent that would serve to exercise the option. Andritz informed Appleton the next day that it would not accept a letter of intent to exercise the option and instead desired a mutual equipment purchase agreement. Smukowski responded by transmitting a mark-up of such an agreement. He acknowledged Andritz's discomfort with an early exercise of the option, but reaffirmed, "we are ready to place an order."

¶4 The parties continued their contacts, with Andritz changing its position several times as to whether it required a letter of intent or a purchase agreement to exercise the option. After continued negotiations and extensions, Andritz sent Appleton a letter on April 18, declaring that the option had expired and that Andritz would not supply or install the coating line. Appleton ultimately found replacement suppliers, but at a substantially higher cost.

¶5 At trial, Andritz employees testified Andritz had significantly underestimated the cost of providing the paper coating line and had deliberately engaged in first a passive, and then an active, strategy to terminate the purchase option.

¶6 The jury awarded Appleton the full amount of its claimed damages, consisting of the following three components: (1) $6.4 million for the additional cost of purchasing replacement coater equipment; (2) $12.1 million for the additional cost of obtaining engineering and installation services; and (3) $10.6 million for building modification costs incurred to accommodate the larger and heavier replacement equipment. Andritz presented no alternative damages analysis and did not call its damages expert to testify. The court denied Andritz's postverdict motions. Andritz now appeals.

DISCUSSION

Agreement granted Appleton unilateral option to purchase

¶7 Andritz first argues it did not grant Appleton a unilateral option to purchase. Interpretation of a contract presents an issue of law that we decide independently. ***Teacher Ret. Sys. of Texas v. Badger XVI Ltd. P'ship***, 205 Wis. 2d 532, 555, 556 N.W.2d 415 (Ct. App. 1996). Unambiguous language in a contract must be enforced as it is written. ***Id.*** "Language in a contract is ambiguous only when it is 'reasonably or fairly susceptible of more than one construction.'" ***Id.*** (quoting ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990)). Individual clauses must be interpreted in the context of the contract as a whole. *See* ***Folkman v. Quamme***, 2003 WI 116, ¶¶19, 21, 264 Wis. 2d 617, 665 N.W.2d 857.

¶8 Andritz emphasizes that paragraph seven of the agreement explicitly states no contract exists unless Appleton issues a purchase order that Andritz accepts. Thus, Andritz argues, Appleton was required to issue a purchase order if it wished to exercise the option, and Andritz retained the right to reject any attempted exercise of the option by not accepting the purchase order.

¶9 Andritz's interpretation is unreasonable. It takes paragraph seven out of context, ignores its opening clause, and requires reading it in a way that nullifies the option to purchase that, in paragraph two, "Andritz ... grants to Appleton." By its terms, paragraph seven recognizes that obligations "specifically provided in this letter agreement" do not depend on Andritz's acceptance of a purchase order.

¶10 Further, paragraph four of the agreement affords Appleton a limited right to assign the option to purchase and prohibits either party from otherwise doing so. If Andritz were correct that paragraph seven affords Andritz a right to reject the purchase option, then the first part of paragraph four allows assignment of a nonright, and the second part is a superfluous limitation on assigning that nonright. Similarly, paragraphs three and five both refer to the timeliness of *Appleton's* execution or exercise of the option.

¶11 Because the agreement specifically provides Appleton an option to purchase, the only reasonable reading of paragraph seven is that the option is exempted from the purchase order requirement. The mere fact that the agreement's introduction and paragraph seven suggest the parties will later utilize a purchase order to document the purchase and "finalize [the] details," does not somehow mandate that Appleton give notice of its election to exercise its option to purchase in any particular manner.

Appleton exercised the option to purchase

¶12 Andritz next argues there is no evidence that Appleton ever exercised the option. It asserts Appleton "told Andritz that it was 'in a position to issue an order' or 'ready' to do so, but it never said the simple words '[Appleton] hereby exercises its option and accepts the offer embodied in the February Agreement.'"

¶13 We conclude the circuit court properly upheld the jury's finding that Appleton exercised the option. Andritz's argument, which essentially asks us to reweigh the facts, is misguided. A court may only reverse a jury's factual

determination if there is no credible evidence to sustain the finding. WIS. STAT. § 805.14(1).[1] We overturn only a clearly erroneous denial of a motion challenging the sufficiency of the evidence. ***K & S Tool & Die Corp. v. Perfection Mach. Sales, Inc.***, 2007 WI 70, ¶29, 301 Wis. 2d 109, 732 N.W.2d 792. In this regard, we accord circuit courts substantial deference because they are in a better position to decide the weight and relevancy of the evidence presented. ***Id.***

¶14 Appleton informed Andritz that it had obtained financing and was ready to place an order. Appleton also made multiple attempts to satisfy Andritz by providing either a letter of intent or a purchase order to execute the option. Appleton further agreed that the "order will be based on scope already negotiated; change orders will be issued for all other work." These facts, considered in light of the agreement's recognition that Appleton required time to obtain financing, constitute sufficient evidence upon which the jury's determination must be upheld. Appleton was not required to use any magic words in order to execute the option.

¶15 Andritz also challenges the jury's finding that Andritz breached its duty of good faith. We need not address this alternative basis for upholding the judgment. *See* ***State v. Castillo***, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts need not address every issue when one issue is dispositive).

Limitation of liability provision not applicable to a breach of the purchase option

¶16 We next address Andritz's contention that the circuit court erroneously failed to apply the agreement's limitation of liability provision to

[1] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

preclude recovery of all consequential damages. This presents an issue of contract interpretation subject to our independent determination. *See* ***Teacher Ret. Sys.***, 205 Wis. 2d at 555.

¶17 Andritz argues the agreement relieves it of liability for the $10.6 million awarded for building modification costs incurred to accommodate the replacement equipment. Paragraph eight of the agreement provides:

> In no event shall either party hereto be liable to the other *for* any incidental, special, indirect or consequential damages of any kind, *or for* lost profits, lost revenues, loss by reasons of plant shut-down or down-time or the plant's inability to operate at full capacity to the extent arising out of the work authorized under this letter agreement. (Emphasis added.)

According to Andritz, this provision contains two distinct limitations of liability: a broad limitation of all incidental or consequential damages, and a specific limitation of lost profits arising from plant shutdowns. Andritz emphasizes the use of "for," and then "or for," arguing the insertion of the second "for" clearly signals a break in structure. Thus, Andritz asserts, the paragraph's limiting clause, "to the extent arising out of the work authorized under this ... agreement," applies only to the language following "or for."

¶18 However, if the paragraph is read as Andritz suggests, then the limiting clause is rendered meaningless surplusage. Lost profits are a subset of consequential damages. *See* ***Insurance Co. of N. Am. v. Cease Elec., Inc.***, 2004 WI 139, ¶31, 276 Wis. 2d 361, 688 N.W.2d 462. If all consequential damages are barred, then all lost profits would already be barred regardless of how they arise. "[A] construction of an agreement which leaves a part of the language useless or creates surplusage is to be avoided." *See* ***North Gate Corp. v. National Food Stores, Inc.***, 30 Wis. 2d 317, 323, 140 N.W.2d 744 (1966).

¶19 A construction based on grammar and punctuation will not prevail if it leads to an unreasonable result. *See* ***Peterson v. Midwest Sec. Ins. Co.***, 2001 WI 131, ¶23 n.7, 248 Wis. 2d 567, 636 N.W.2d 727; ***Mahon v. Security First Nat'l Bank***, 56 Wis. 2d 171, 179, 201 N.W.2d 573 (1972). We therefore affirm the circuit court's ruling that paragraph eight's limitation of liability does not apply to a breach of the option to purchase.

The building modification costs were foreseeable and caused by the breach

¶20 Consequential damages are not recoverable unless they were both foreseeable as a probable result at the time of contracting and caused by the breach. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 320-22, 306 N.W.2d 292 (1981). Andritz argues Appleton's building modification costs were neither.

¶21 Andritz again asks us to reweigh the evidence. That is not our prerogative. *See* WIS. STAT. § 805.14(1); ***K & S Tool***, 301 Wis. 2d 109, ¶29. The parties did foresee building modifications as part of the project, and Appleton had specifically asked Andritz to consider configuring its coating line to minimize the cost of those modifications. The Andritz machine had a significant advantage over others because of its compact design, and thus lower cost to install in the existing building. Andritz was fully aware of the advantage it enjoyed over Appleton's other bidders in this regard. Thus, the jury had credible evidence from which to conclude Andritz could foresee that Appleton would probably incur increased building costs as a consequence of Andritz's refusal to supply the coating line.

¶22 There was also credible evidence that the added building modification costs were a natural and probable consequence of Andritz's breach.

When Andritz refused to perform, Appleton turned to the next lowest bidder, Metso, which offered a machine with substantially greater space requirements. The only licensed professional engineers who testified on the subject agreed that additional building modifications became necessary when Andritz withdrew and Appleton had to proceed with the Metso coating line.

The jury instructions and special verdict forms were proper

¶23 Andritz presents numerous claims regarding jury instructions and special verdict forms. We address each in turn.

¶24 Andritz first complains the court failed to give a causation instruction informing the jury that any bad faith conduct on Andritz's part must have caused Appleton to fail to exercise the option to purchase. We have already upheld the jury's finding that Appleton exercised the option. Therefore, we need not address the instruction on the alternative theory of liability. *See* ***Castillo***, 213 Wis. 2d at 492. For the same reason, we also do not address Andritz's related argument that there should have been a special verdict question on the issue.

¶25 Andritz next claims the court's "Additional Terms in Acceptance" instruction was affirmatively misleading. That instruction essentially mirrors the language of WIS. STAT. § 402.207. The instruction therefore accurately set forth the law. Andritz further argues the court improperly rejected Andritz's proposed revision. Andritz's revision, however, misstates the law set forth in § 402.207.

¶26 Next, Andritz argues the circuit court should have given Andritz's proposed "Agreements in Principle" instruction. Andritz fails to provide any legal authority requiring this proposed instruction or develop a proper argument. We

therefore do not address the issue. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994).

¶27 Andritz next argues the court should have given Andritz's proposed instruction regarding acceptance according to a specified method. The actual instruction the court utilized, however, conveyed the same information. The mere fact that Andritz's proposed instruction also properly stated the law does not somehow provide Andritz a basis for relief. A circuit court has broad discretion when instructing a jury, and if the overall meaning communicated by the instructions was a correct statement of the law, no grounds for reversal exist. ***Fischer v. Ganju***, 168 Wis. 2d 834, 849-50, 485 N.W.2d 10 (1992).

¶28 Andritz also argues the court should have given Andritz's proposed instruction regarding the expiration of an option. Again, the court gave another instruction that conveyed the same information. *See* ***id.***

¶29 Andritz next contends the court erroneously failed to give Andritz's proposed "Demand for Performance" instruction and verdict question. Andritz requested WIS JI—CIVIL 3054, providing, "Before an action may be maintained for a breach of contract, a demand for performance in accordance with the contract must be made." Andritz's instruction would have misstated the law. The Uniform Commercial Code requires notice of breach only when a buyer has accepted delivery of the goods and then discovers a nonconformity. *See* WIS. STAT. §§ 402.607(3), 402.714. When a seller under the commercial code fails to make a delivery or repudiates the contract, there is no such requirement. *See* WIS. STAT. § 402.711.

¶30 Andritz next argues the special verdict questions on breach misled the jury because they were mutually exclusive and the jury's verdict was therefore

inconsistent. That is, Andritz emphasizes the jury could not conclude both that Appleton exercised the option and that Andritz's bad faith conduct caused Andritz's failure to exercise the option. The bad-faith verdict question, however, did not ask whether Andritz caused Appleton not to exercise. It asked only whether Andritz acted in bad faith. Therefore, the questions were not inconsistent on their face. Further, we have already concluded it is unnecessary to resolve the causation issue vis-à-vis the alternative bad faith claim, because the jury concluded Appleton did exercise the option.

¶31 Finally, Andritz argues it is entitled to a new trial on damages because the jury was not instructed that a damage award could not put Appleton in a better position than if Andritz had fully performed and because the verdict questions did not address the issue. Further, Andritz claims the court's alternative instruction regarding "cover" was misleading.

¶32 The court's cover instruction informed the jury it could conclude Appleton did not cover "if the replacement purchase was not a like-kind purchase but instead was better than what Andritz had offered to sell ...." The verdict questions then required the jury to choose between cover damages and an alternative method of determining damages. Therefore, the jury was properly instructed that Appleton could not recover damages related to being put in a better position. Further, contrary to Andritz's partial recitation of the cover instruction, a full reading of the instruction reveals it was not misleading or confusing.

By the Court.—Judgment affirmed.

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