

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 25, 2011**

A. John Voelker  
Acting Clerk of Court of Appeals

**NOTICE**

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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. 2010AP1049**

**Cir. Ct. No. 2008CV85**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT II**

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**WALTER & SON WASTE HAULERS, LLC,**

**PLAINTIFF-APPELLANT,**

**V.**

**PHENCO, INC., A WISCONSIN CORPORATION,**

**DEFENDANT-RESPONDENT,**

**NORTH AMERICA SPECIALTY INSURANCE COMPANY,**

**DEFENDANT.**

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APPEAL from a judgment of the circuit court for Walworth County:  
JOHN R. RACE, Judge. *Affirmed and cause remanded with directions.*

Before Brown, C.J., Anderson and Reilly, JJ.

¶1 PER CURIAM. Walter & Son Waste Haulers, LLC, appeals from a judgment for damages and an award of attorney’s fees and costs. Walter argues that the circuit court erred when it did not amend the jury’s verdict, that the evidence at trial was insufficient to support the jury’s verdict, that the circuit court erred when it gave one special verdict question, and that the trial court erred when it awarded attorney’s fees and costs. We conclude that the circuit court did not err, and we affirm the judgment and the award of costs and fees. Further, we conclude that the respondent, Phenco, Inc., is entitled to attorney’s fees and costs for the portion of this appeal that concerned the Mound Road project agreement, and we remand the matter to the circuit court for a determination of the proper amount of fees and costs for this appeal.

¶2 This is a breach of contract dispute. The respondent, Phenco, is a construction contractor. Phenco contracted with Walter to dredge three separate projects: two for the Town of Delavan—only one of which, the Mound Road project, is the subject of this appeal—and one for the City of Middleton. Phenco and Walter had a written agreement for the Mound Road project and an oral agreement for the Middleton project.

¶3 The evidence at trial established that Walter began dredging the Mound Road project in July 2007, but stopped when they hit gravel and clay. Walter claimed that they could not dredge this material and they were not required to do so by the contract. Walter left the site. Phenco then attempted to get Walter to return to the job to dredge a different portion of the project. Walter responded that they could not because they were busy with a project in Illinois. Walter returned to the Mound Road project in October 2007, but left again permanently in January 2008. The work was ultimately completed by another subcontractor.

¶4 Walter’s work on the Middleton project was stopped when the project was shut down by the Department of Natural Resources. Walter did not cause the problem that led to the shutdown. Rather, the problem that led to the delay was attributed to Middleton’s City Engineer. Walter claimed that Phenco had agreed to pay them for the “down time,” but Phenco did not pay Walter for their time.

¶5 Walter sued Phenco alleging, among other things, that Phenco owed them money for the work on the Mound Road project and for the time they stood idle on the Middleton project. Phenco counterclaimed alleging that Walter had breached the contract and that the damages Phenco had incurred as a result exceeded the balances that Phenco owed Walter. A jury trial was held. The jury found that Walter had breached the Mound Road project contract and that Phenco had not breached the Middleton contract.

¶6 Walter brought a post-judgment motion challenging the special verdict answers on the Mound Road project, and for a new trial on the Middleton project. The circuit court denied the motion, and awarded costs and fees for the time Phenco’s counsel spent on the Mound Road project portion of this case against Walter. Walter appeals.

¶7 Walter argues to this court that the circuit erred when it refused to change the answers to three special verdict questions concerning the Mound Road project. The first question asked if Phenco had breached the contract. A majority of the jury answered “no.” The second question awarded zero damages to Walter because there was no breach of contract, and the third question awarded damages to Phenco in the amount of \$25,419.45 for Walter’s breach of the Mound Road project.

¶8 Walter’s argument about these three special verdict questions appears to be that the jury’s answers suggest that the jury meant to find that Phenco had breached the contract, and therefore, the jury damage award amounts must be changed. Walter states that the damages the jury awarded to Phenco included a set-off amount for money Phenco owed Walter for work Walter performed on the Mound Road project. Walter asserts that the contract did not provide for set-offs, and that the jury, therefore, found by implication that Phenco breached its contract with Walter. Walter then asserts that the special verdict question about whether Phenco breached a contract with Walter should be changed to “yes,” that the amount of damages awarded to it should be changed from zero to the amount of the set-off, and the amount damages awarded to Phenco should be the \$25,419.45 plus the set-off amount. The circuit court refused to change the answers to these special verdict questions.

¶9 We will sustain the circuit court’s refusal to change a special verdict if there is any credible evidence that under any reasonable view supports the jury’s verdict. *Hanson v. American Family Mut. Ins. Co.*, 2006 WI 97, ¶18, 294 Wis. 2d 149, 716 N.W.2d 866. We reject the argument that the jury’s deduction of a set-off amount from the damage award to Phenco establishes that the jury really concluded that Phenco breached the contract. To the contrary, the jury found that Phenco did not breach the contract. Further, the record shows that there was credible evidence to support the jury’s answers to all these questions. Because we reject Walter’s argument that the answer must be “yes,” we also see no reason to change the jury’s damage awards amount.<sup>1</sup>

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<sup>1</sup> The net result of change would be the same amount of damages to Phenco.

¶10 Walter next argues that the great weight and clear preponderance of the evidence goes against the jury's determination that Walter breached the Mound Road contract. Walter argues that there was evidence presented at trial that established a good reason for why they left the Mound Road project between July and October 2007. Walter also argues that they left the project entirely in January 2008 because Phenco had not paid them.

¶11 The credibility of witnesses and the weight to be accorded to their testimony are among the matters appropriately left to the jury's judgment, and where more than one inference is possible, the inference drawn by the jury must be accepted. *Roach v. Keane*, 73 Wis. 2d 524, 536, 243 N.W.2d 508 (1976). The record contains evidence that would allow a jury to conclude that Walter could have continued to work on other parts of the Mound Road project instead of stopping work altogether. The jury determined that Phenco's version was more credible, and there was credible evidence to support that determination. The circuit court, therefore, did not err when it denied Walter's motion to change this special verdict answer.

¶12 Walter next argues that the circuit court erred when it included a special verdict question that asked whether the principle purpose of the Middleton project agreement between Walter and Phenco was "frustrated by the supervening negligent acts or omissions of the [City's] project engineer." The jury answered "yes" to this question.

¶13 Walter argues that this special verdict question, when considered with a related jury instruction, suggested that if the City engineer was negligent, then Phenco was excused from its obligation to pay Walter for their work on the Mound Road project. Walter asserts in its brief-in-chief that the question probably

“prejudiced the jury’s consideration” of two other questions.<sup>2</sup> Walter’s argument on this issue is not well-developed. Walter does not explain, for example, how the question could have prejudiced the jury. In any event, we are not convinced that the court erred in giving the jury this question. There was credible evidence presented at trial to support the jury’s answer that the negligence of the City’s engineer caused the delay at the Middleton project.

¶14 Walter next argues that the circuit court erred when it awarded costs and attorney’s fees to Phenco. The agreement between Walter and Phenco for the Mound Road project contained a fee-shifting provision that said the subcontractor shall reimburse the contractor for actual attorney’s fees and costs incurred in enforcing the contract. Walter argues that the circuit court misinterpreted the word “enforce” as used in the fee-shifting portion of the contract; that the fee award was not supported by the record; and that the fee award is out of proportion to the damage award. “When a circuit court awards attorney fees, the amount of the award is left to the discretion of the court. We uphold the circuit court’s determination unless the circuit court erroneously exercised its discretion.” *Kolupar v. Wilde Pontiac Cadillac, Inc.*, 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58 (citation omitted).

¶15 Walter first argues that the court misinterpreted the word “enforce.” Walter draws a distinction between enforce and defend, and argues that Phenco is not entitled to fees and costs for the time it spent “defending” against Walter’s

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<sup>2</sup> Walter argues for the first time in its reply brief that the special verdict question contains an inaccurate statement of law. Because he did not make the argument in his brief-in-chief, we will not consider it. See *Swartwout v. Belsie*, 100 Wis. 2d 342, 346 n.2, 302 N.W.2d 508, 512 (Ct. App. 1981).

claims. We conclude that this is a distinction without a difference. Phenco both successfully defended against Walter's claim and pursued its counterclaim, and litigated the matter to enforce its rights under the contract. We are not convinced that the circuit court misinterpreted the word enforce.

¶16 Walter's second argument is based on the allocation of fees. Phenco was entitled to recover fees and costs under the Mound Road agreement only. When making its request for fees, Phenco's attorney allocated a portion of each time entry in his bills to the time he spent on that project. Walter objects that Phenco's attorney did not produce sufficient documentation to support the apportionment of time spent on the Mound Road project. Walter is arguing, in essence, that the evidence was insufficient to support this award. We disagree.

¶17 The record shows that at the hearing on fees, Phenco's attorney explained at length the method and reasoning he used for allocating time spent on the Mound Road project. The attorney explained that he reviewed not only his time entries, but his notes, pleadings, discovery, motions, and other documents. Phenco also presented an expert witness who analyzed the method Phenco used to allocate fees and offered an opinion that the method was reasonable. The circuit court found this evidence to be reasonable, and we see no reason to disturb the court's finding.

¶18 Walter's last argument relating to fees is that the award is not fair because it is out of proportion to the damage award Phenco received. Walter argues that under *Shadely v. Lloyds of London*, 2009 WI App 165, ¶22, 322 Wis. 2d 189, 776 N.W.2d 838, Phenco should have received a lesser or no fee award. In that case, we concluded that the circuit court erred under the language of the fee shifting provision of a contract when it awarded the successful party the

entirety of her fees. *Id.*, ¶21. In so doing, we concluded that the contract term “successful party” was ambiguous in context, and that it would be unjust to allow the successful party to recover fees when she was only nominally successful. *Id.*, ¶¶18, 21-23. We held that under the terms of that fee shifting provision, the successful party was entitled to recover only that proportion of attorney’s fees that equated to her success at trial. *Id.*, ¶23.

¶19 We reject Walter’s argument on this issue for two reasons. First, the fee shifting provision in the contract at issue here does not contain a term that is ambiguous in the context of this case. Second, the award of fees was not out of proportion to Phenco’s success at trial. Phenco successfully defended against a damage claim and recovered its damages on its counterclaim. It is entitled to the fees it was awarded.

¶20 Walter also argues that the trial court erroneously exercised its discretion when it imposed costs. Walter asserts that the court erred by not considering Walter’s objections to the costs. We are not convinced that the circuit court erred when it imposed statutory costs.

¶21 We also conclude that Phenco is entitled under the fee shifting portion of the Mound Road agreement to recover the attorney’s fees and costs for defending this appeal. Consequently, we affirm the judgment of the circuit court and remand the matter back to that court for a determination of the appropriate amount of attorney’s fees and costs for this appeal.

*By the Court.*—Judgment affirmed and cause remanded with directions.

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

