

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 13, 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. 03-1501  
STATE OF WISCONSIN**

**Cir. Ct. No. 01CV001483**

**IN COURT OF APPEALS  
DISTRICT III**

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**JANDRIN ELECTRIC, INC.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ABEL ELECTRIC, INC.,**

**DEFENDANT-RESPONDENT,**

**CIRCLE ELECTRIC, INC.,**

**DEFENDANT-THIRD-  
PARTY PLAINTIFF-APPELLANT,**

**V.**

**WATERTOWN MEMORIAL HOSPITAL, INC., F/K/A  
WATERTOWN MEMORIAL HOSPITAL ASSOCIATION, INC.,  
WATERTOWN SENIOR HOUSING, LLC, AND JAMES F.  
JANDRIN,**

**THIRD-PARTY DEFENDANTS.**

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

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

¶1 CANE, C.J. Circle Electric, Inc., claims it entered into a contract with Jandrin Electric, Inc., for electrical work on a project at a rate of \$36.75 an hour without a maximum hours limit. Circle argues Jandrin breached that contract when it removed Circle from the project before the project was completed and refused to pay Circle over \$100,000 for its work. After a court trial, the circuit court found there was no contract because there was not a meeting of the minds, but it awarded Circle \$14,645.35 for the services it rendered on a quantum meruit theory. Circle argues the trial court erred by (1) finding there was no contract; and (2) awarding statutory costs to Jandrin. We disagree with both arguments and affirm the judgments.

### **BACKGROUND**

¶2 Sometime in August or September 2000, Abel Electric, Inc., was hired as the electrical contractor for the construction of an apartment complex. Abel was interested in subcontracting the work to Jandrin. Jandrin, which previously worked with Circle, in turn contacted Circle to subcontract the work. Jandrin requested Circle to provide it with a labor quote, and, on September 22, Circle sent Jandrin a fax indicating Circle would bill \$36.75 an hour for its labor. Jandrin estimated the project required approximately 1,566 hours. Jandrin then submitted to Abel a bid for the electrical work based on the hourly rate Circle provided, the labor hours and materials Jandrin estimated would be required.

¶3 On October 10, Jandrin called Circle to discuss the project and the availability of Circle's workers in order to ensure the project's timetable could be met. A few days later, Circle informed Jandrin it could meet the project timetable. Later that same day, Abel accepted Jandrin's bid.

¶4 At trial, Roger Kastanek, Circle's owner, testified Jandrin never informed Circle about the 1,566 estimated labor hours. On the other hand, James Jandrin, Jandrin's owner, testified Circle understood Jandrin submitted its bid to Abel using 1,566 labor hours. James further testified that Kastanek indicated he could complete the project for "around that," referring to Jandrin's estimated labor hours.

¶5 Circle began working on the project in November. Between November and January 2001, Circle sent Jandrin three invoices, all of which Jandrin paid. However, in mid-January Jandrin received phone calls from the project's manager complaining about how Circle employees were wasting time by taking breaks and lunch hours that were too long. After receiving Circle's fourth invoice, Jandrin saw Circle had already exceeded the estimated labor hours for the project without completing the project.

¶6 In February, Jandrin sent Circle a memorandum that stated it was Jandrin's understanding the parties agreed to a cap of 1,566 on the hours for which Circle would get paid. The project's general manager also sent a memorandum to all subcontractors warning that if the schedule for the electrical work was not met additional laborers would be hired and Jandrin and Circle would be back-charged for their time.

¶7 After receiving Circle's fifth invoice, Jandrin saw Circle was still billing for its labor. Jandrin removed Circle from the project on April 14, after

Circle billed around 3,440.5 hours having completed only approximately 55% of the project. Jandrin's employees then took over the project and completed it in 1,421 hours. Jandrin sued Circle, among others, for breach of contract, and Circle counterclaimed seeking \$108,244.62 in damages.

¶8 The trial court found a contract did not exist between Circle and Jandrin because there never was a meeting of the minds. The court amended Circle's counterclaim, sua sponte and without objection, to a quantum meruit counterclaim and awarded Circle \$14,645.35, the reasonable value of the services it rendered, less the amount Jandrin already paid Circle and less Jandrin's expenses for finishing the project. The court denied court costs to Circle because the court found its 3,440.5 labor hours were outrageous and unconscionable. Thus, even though judgment was awarded in Circle's favor, the court concluded Jandrin essentially prevailed in the action.

## DISCUSSION

¶9 Circle first argues the trial court erred by finding there was no meeting of the minds, thus no contract, between Circle and Jandrin. Circle claims a September 22 fax contains the terms for a time and materials contract,<sup>1</sup> specifically that Circle agreed to provide labor at a rate of \$36.75 per hour without mentioning a cap on hours worked. Thus, Circle argues we should conclude, as a

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<sup>1</sup> A "time and material contract" is a contract where one hires a contractor to do work but does not make a specific contract for a definite sum. *La Velle v. De Luca*, 48 Wis. 2d 464, 469, 180 N.W.2d 710 (1970). When this type of contract occurs, "it is generally understood to be for time and material as that contractor does business, i.e., his [or her] usual charges for such work." *Id.*

matter of law, that a time and materials contract existed that entitles Circle to compensation for the full amount of work hours performed.

¶10 “The essence of a contract is whether the minds of the parties have met on the same thing.” *In re Estate of Kobylski*, 178 Wis. 2d 158, 189, 503 N.W.2d 369 (Ct. App. 1993). However, whether there was a meeting of the minds is a fact question for the trier of facts to resolve. *See id.*; *see also Household Utils. v. Andrews Co.*, 71 Wis. 2d 17, 29, 236 N.W.2d 663 (1976). Given that this was a trial to the court, we will not overturn the trial court’s factual findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). We search the record for evidence to support the court’s fact findings. *In re Estate of Dejmal*, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980).

¶11 Here, the trial court found there was not a meeting of the minds. Based on Circle’s proposed labor rate of \$36.75 an hour, Jandrin estimated the project required 1,566 hours to complete. While Jandrin presented evidence that Circle knew of and agreed to the cap, Circle’s witnesses testified otherwise. Without finding either more credible, the court apparently believed both parties had different understandings and, accordingly, concluded there was no meeting of the minds. The trial court stated that “[o]ne side was talking apples with caps, the other side is talking oranges and materials and labor. The parties never agreed.” Because there is ample evidence to support both Circle’s and Jandrin’s accounts, and because the trial court as the trier of fact “resolve[s] questions as to the weight of testimony and the credibility of witnesses,” *State v. Hughes*, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621, the court’s finding that there was not a

meeting of the minds is not clearly erroneous.<sup>2</sup> Consequently, it properly concluded there was not a valid contract between Jandrin and Circle and awarded Circle \$14,645.35 on the principle of quantum meruit.

¶12 Circle next contends the trial court should have awarded it, and denied Jandrin, statutory costs. Circle claims that because the trial court awarded judgment in Circle's favor, and because Jandrin did not prevail on any of its claims, Circle is entitled to costs while Jandrin is not.

¶13 The trial court awarded costs based on WIS. STAT. § 814.035(2). That section states, "When the causes of action stated in the complaint and counterclaim and cross complaint arose out of the same transaction or occurrence, costs in favor of the successful party upon the complaint and counterclaim and cross complaint so arising shall be in the discretion of the court."

¶14 Here, the trial court found there was no contract, but then the court effectively amended Circle's answer, without objection, to include a quantum meruit counterclaim and entered judgment in Circle's favor on that theory. *See State v. Peterson*, 104 Wis. 2d 616, 628, 312 N.W.2d 784 (1981) (trial court may amend the pleadings on its own motion). However, the court ultimately awarded a judgment that was significantly less than what Circle sought.

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<sup>2</sup> Circle argues at some length that Jandrin's assertion that the parties' agreement contained a cap is contradicted by the facts. However, again, because the court was the trier of fact in this case, it "resolve[s] questions as to the weight of testimony and the credibility of witnesses." *State v. Hughes*, 2000 WI 24, ¶2 n.1, 233 Wis. 2d 280, 607 N.W.2d 621. Here, the court gave equal weight to both Circle's and Jandrin's evidence and found both accounts credible. Essentially, Circle asks us to disregard the trial court's findings. Because there is sufficient evidence to support both Circle's and Jandrin's accounts, our standard of review prohibits us from doing what Circle requests.

¶15 Circle sought \$108,244.62 in damages. The court found that Circle's employees worked slowly, inefficiently and wasted a great deal of time. Because of this, the court found the 3,440.5 hours Circle charged was "unconscionable, ... ridiculous, and ... an attempted rip-off ...." The court found Circle should have completed its work in 1,233.2 hours at a rate of \$36.75. After adding seventy-six hours of labor that the parties stipulated to at a rate of \$35 as well as the materials Circle used, the court found Circle performed work worth a gross value of \$53,850.54. However, the court then deducted \$24,064.19 Jandrin already paid Circle, as well as \$15,141 error correction time and the travel time Jandrin incurred after it removed Circle from the project. Therefore, the court found Circle was owed \$14,645.35. Nevertheless, the court awarded costs to Jandrin because Circle's overcharges were unreasonable.

¶16 When viewing the ultimate result, it was reasonable for the trial court to award Jandrin costs for either of two reasons. Because the court found Circle's charged hours were unconscionable, it awarded Circle only a fraction of the damages it sought. Thus, the trial court could have reasonably concluded that Jandrin was the successful party. *See* WIS. STAT. § 814.035(2).

¶17 Alternatively, the court awarded Jandrin just over \$15,000 in expenses it incurred to correct Circle's substandard work, which was then deducted from Circle's quantum meruit award. In *Mid-Continent Refrigerator Co. v. Straka*, 47 Wis. 2d 739, 751, 178 N.W.2d 28 (1970), a case involving the predecessor to the current statute, the supreme court held that where both parties recover on their claims in an action, costs are purely discretionary. Again, the trial court concluded Circle's overcharges were unreasonable and, therefore, Jandrin was entitled to costs. In view of this finding, the trial court did not erroneously exercise its discretion by awarding Jandrin costs.

*By the Court.*—Judgments affirmed.

Not recommended for publication in the official reports.



