

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 12, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 94-2242

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**RENEE MEEKS, d/b/a
MILWAUKEE DISPATCH SERVICE,**

Plaintiff-Respondent,

v.

**MICHELS PIPE LINE CONSTRUCTION, INC.,
a Wisconsin Corporation,
and ST. PAUL FIRE & MARINE INSURANCE COMPANY,
d/b/a ST. PAUL/SEABOARD, a Foreign Corporation,**

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: JOHN B. DANFORTH, Reserve Judge. *Reversed and cause remanded.*

Before Wedemeyer, P.J., Fine, J., and Michael T. Sullivan, Reserve Judge.

PER CURIAM. Michels Pipe Line Construction, Inc., and St. Paul Fire & Marine Insurance Company, appeal from a judgment awarding Renee

Meeks, d/b/a Milwaukee Dispatch, damages against Michels Pipe Line for breach of contract and breach of duty of good faith and fair dealing, and against St. Paul for its liability on a payment bond St. Paul issued on Michels Pipe Line's behalf. We conclude the trial court erred by not granting Michels Pipe Line and St. Paul's motion for summary judgment dismissal. Accordingly, we must reverse and remand the matter to the trial for resolution consistent with this opinion.¹

I. BACKGROUND.

Meeks owned a trucking business that leased trucks and obtained trucks and drivers to work on jobs she procured. In 1990, the Milwaukee Metropolitan Sewerage District opened public bids on a project known as the North Shore 6 Collector System Project (NS-6). Among other things, the bid documents specified contractual requirements and goals that the prime contractor to be awarded the bid had to meet. Michels Pipe Line was one of the bidders on this project.

In preparation of its bid, Michels Pipe Line contacted Meeks and other potential subcontractors. Meeks responded to the inquiry with what turned out to be the low bid—she proposed that her company would perform the trucking for the proposed contract at an hourly rate of \$35 for tri-axle and \$37 for quad-axle dump trucks.

Michels Pipe Line then sent Meeks a subcontractor form, which requested information including the firm's status as a small, woman or minority owned business enterprise (S/W/MBE). Meeks filled in the form, acknowledging her S/W/MBE status, and returned it to Michels Pipe Line, which in turn filled in the type of service Meeks was providing and the dollar amount of the service provided both in actual dollars and the percentage of Michels Pipe Line bid price expected to be awarded to Meeks. The form stated

¹ Several other issues are raised by Michels Pipe Line and St. Paul that we need not address because we reverse on the summary judgment issue. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).

Meeks was expected to be paid \$98,772, or 2.41% of the bid price, for her trucking service.

The Sewerage District eventually awarded Michels Pipe Line the NS-6 project as prime contractor. Michels Pipe Line then sent a purchase order, dated January 21, 1991, to Meeks that specified the hourly trucking rates proposed by Meeks and the dates of her contract would be "as called for."²

² The contract between Michels Pipe Line and the Sewerage District provided in relevant part:

It is the policy of the Owner to insure that small, women's and minority business enterprises be allowed the maximum feasible opportunity to compete on district construction contracts.

The Owner has established a system of minimum participation goals for construction contracts. These goals are as follows:

....

Women Business Enterprise 2% of contract or
Involvement Goal contract as modified
amount.

Small Business Enterprise 5% of contract or
Involvement Goal contract as modified
amount.

Any bidder is required to make good faith efforts to meet the percentage participation goals established on the contract and to make good faith efforts to include small, women's and minority businesses in their bid or proposal to the maximum extent possible.

Further, Michels Pipe Line signed a Subcontractor Listing which stated, in part:

The Bidder certifies that the firms identified on each subcontractor listing will be awarded subcontracts for the indicated portions of the work in the event the Bidder is awarded the contract. The bidder agrees that, after the opening of bids, no changes or substitutions in the listing will be allowed without the written approval of the Owner. Requests for such changes or substitutions shall be made in writing with appropriate documentation and reasons included.

Construction work on the project was to commence in March or April 1991, but was delayed by, among other things, a strike at a pipe supplier. Construction eventually began and Meeks provided her trucking service. In February 1992, a Michels Pipe Line employee, Robert Downs, filed a grievance against his employer with the Teamster's Union. Downs alleged that he had been laid off by Michels Pipe Line, but that the company continued to use S/W/MBE subcontractors. He alleged that this violated the Sewer, Tunnel, Water and Utilities Agreement between the Teamsters Local 200 and the Wisconsin Underground Contractors Association (WUCA). This agreement provided that an "employer may hire additional trucking when his equipment and his own employees are fully employed." Downs sought back pay and reinstatement.

Michels Pipe Line defended its actions by stating that it had hired S/W/MBE subcontractors to work on public works projects and that it could not rehire Downs. In a closed session hearing, the Union and WUCA reached an agreement that became the arbitrator's decision in the case. The decision stated only that Michels Pipe Line had to pay Downs \$1,500 in settlement of the grievance and that the settlement would not affect any unemployment compensation he received.

Downs was reinstated the day after the grievance hearing; he began working at two sites—including the NS-6 project. Meeks continued to
(..continued)

Among instructions to Michels Pipe Line included in the contract documents was one titled "Certification." The document included a subsection titled "Substitution or Replacement," which provided:

Requests for substitution or replacement of any firm that the bidder has listed for use to meet the small, women's and minority business enterprise provisions of this policy will not be granted after bid opening except for good cause established by the contractor. A lower price by the proposed substitute or replacement for the listed small, women's or minority business enterprise is not good cause. An increase of the quoted price in toto or on a per unit basis by the small, women's or minority business enterprise may be good cause, depending upon the circumstances. Inability to perform work on a subcontract can be good cause, depending upon the circumstances.

work at the project for another five months, at which time Michels Pipe Line informed her that her company's services would no longer be needed.

Meeks billed Michels Pipe Line throughout her time at the project and she was paid nearly \$62,000; this was the full amount for the actual work she performed. After she was terminated at the project, she billed Michels Pipe Line for \$37,490, the approximate difference between what she had been paid and Michels Pipe Line's estimate of her company's total expected services; that is, \$98,772. Michels Pipe Line decline to pay her, informing her by letter that her company had been contracted on an hourly basis and that her company had been paid in full for her work.

Meeks then contacted the Sewerage District and spoke with its contract compliance officer, Paul Wechter. Wechter then contacted William Weltin, a vice president at Michels Pipe Line involved with the NS-6 Project, to ascertain why Meeks's company had not been used to the full extent in the initial bid. By telephone, Weltin informed Wechter that due to Downs's grievance and the obligation to rehire him, Michels Pipe Line was unable to use Meeks's company for the full amount estimated. Wechter's department manager informed Wechter that Michels Pipe Line's reason for under-utilization of Meeks's company constituted good cause for substitution. The Sewerage District informed Meeks that Michels Pipe Line's substitution had been approved; Wechter also wrote to Michels Pipe Line for documents to substantiate the company's position. Michels Pipe Line sent the Sewerage District the minutes from the grievance panel hearing on Downs's complaint.

Meeks filed suit against Michels Pipe Line and St. Paul, alleging, *inter alia*, that she was entitled to the full \$98,772, regardless of the amount of work her company performed on the project. Michels Pipe Line and St. Paul moved for summary judgment dismissal, arguing first that Meeks was not a third-party beneficiary to its contract with the Sewerage District, and further, that even if Meeks were a third-party beneficiary, the contract between Michels Pipe Line and the Sewerage District stated that it could be changed with the District's approval. They argued that because there was no genuine question of material fact over whether the District had approved Meeks's substitution, summary judgment dismissal should be granted.

The trial court, the Hon. Michael Skwierawski presiding, orally ruled at the summary judgment hearing that Meeks was a third-party beneficiary to the contract, and that there was a genuine issue of material fact whether Meeks's services were improperly substituted because Michels Pipe Line had made false representations to the Sewerage District over the reinstatement of Downs. No written order was entered memorializing Judge Skwierawski's ruling. Hence, when the case went to trial before Reserve Judge John Danforth, he was uncertain over the extent of the earlier summary judgment ruling.

The case went to trial and the special verdict asked the jury whether Michels Pipe Line had a lump sum contract with Meeks and whether Michels Pipe Line breached any obligation to Meeks. The jury found that no lump sum contract existed, but it did find that Michels Pipe Line had breached a duty to Meeks and awarded her \$27,500 in damages. Michels Pipe Line and St. Paul now appeal from the judgment entered on that verdict.

II. ANALYSIS.

We conclude that the dispositive issue raised by Michels Pipe Line and St. Paul is whether the trial court improperly denied their request for summary judgment dismissal of Meeks's suit. We conclude that there were no genuine issues of material fact in conflict at the time of the summary judgment motion—the materials clearly show that Michels Pipe Line properly substituted Meeks's services and that the Sewerage District approved this change in the contract. Therefore, Meeks's suit was not viable and should have been dismissed.

“Summary judgment is appropriate to determine whether there are any disputed factual issues for trial and `to avoid trials where there is nothing to try.’” *Caulfield v. Caulfield*, 183 Wis.2d 83, 91, 515 N.W.2d 278, 282 (Ct. App. 1994) (citation omitted). When we review a motion for summary judgment, we apply the same methodology as the trial court, but we do not accord the trial court's conclusion any deference. *Kotecki & Radtke, S.C. v. Johnson*, 192 Wis.2d 429, 436, 531 N.W.2d 606, 609 (Ct. App. 1995). The methodology is oft repeated:

[W]e first examine the pleadings to determine whether they state a claim for relief. If the pleadings state a claim and the responsive pleadings join the issue, we then must examine the evidentiary record to analyze whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. Further, “[o]n summary judgment, we must draw all justifiable inferences in favor of the non-moving party, including questions of credibility and of the weight to accorded particular evidence.”

Bay View Packing Co. v. Taff, 198 Wis.2d 654, 674, 543 N.W.2d 522, 529 (Ct. App. 1995) (citation omitted).

The trial court decided that Meeks was a third-party beneficiary of the contract between Michels Pipe Line and the Sewerage District. The parties disputed at summary judgment whether Meeks was as a matter of law a third-party beneficiary to the contract. The parties renew this dispute on appeal. We need not decide this issue to resolve the appeal; we assume for purposes of summary judgment that Meeks was a third-party beneficiary. See *id.* at 529 (citation omitted).

The crux of this case is whether genuine issues of material fact existed for Meeks's substitution under the contract. Meeks argued that questions of fact remain whether Michels Pipe Line misrepresented to the Sewerage District the Downs's grievance panel determination that Michels Pipe Line reinstate Downs, thereby justifying Meeks's substitution. Our review of the summary judgment materials shows that no genuine issues of material fact existed and that the trial court erred when it denied Michels Pipe Line and St. Paul's motion for summary judgment.

The summary judgment materials provide the following information. Weltin, a Michels Pipe Line vice president, stated in his uncontroverted affidavit that because of the Downs's grievance decision, Michels Pipe Line had to reinstate Downs and therefore was unable to utilize Meeks's trucking service as originally planned. He further stated:

As a result of the unforeseen occurrence involving Downs'[s] grievance, Michels sought and obtained MMSD's approval for the change in the utilization of Meeks'[s] trucking services pursuant to the terms of its agreement with MMSD.

Meeks asserted that Michels Pipe Line had fraudulently obtained the Sewerage District's approval because the minutes of the Downs's grievance hearing discussed only a cash settlement with Downs, not a requirement that Michels Pipe Line reinstate Downs. Meeks is correct that the transcripts of the hearings in the summary judgment materials do not mention Downs's reinstatement. Michels Pipe Line, however, provided affidavits from those present at the hearing, all of whom stated that the grievance arbitrators required Michels Pipe Line to reinstate Downs. Meeks provided nothing in the summary judgment materials to dispute these affidavits.

We also see no genuine issues of material fact surrounding the Sewerage District's approval of Michels Pipe Line's substitution of Meeks. Wechter, the District's contract compliance officer, averred that verbal assurance from prime contractors on the reasons for the contractors' non-compliance with a contract is a necessary accommodation to demands of a project such as the one at issue here. Thus, nothing was unusual in the procedure used by Michels Pipe Line to substitute Meeks. The contract allowed for such a change with the approval of the District. The District did approve the substitution; this approval was sent to Meeks.

In sum, although the contract and subcontract listings were quite detailed and lengthy, under the summary judgment materials present at the time of the summary judgment motions there were no genuine issues of material fact surrounding Meeks's causes of action. The materials clearly defeat all of her claims; there was no way she could prevail under any circumstance. See *Barillari v. City of Milwaukee*, 194 Wis.2d 247, 256, 533 N.W.2d 759, 762 (1995). The trial court erred when it denied Michels Pipe Line and St. Paul's motion for summary judgment dismissal. Accordingly, we reverse the judgment and remand the matter to the trial court for resolution consistent with this opinion.

By the Court. – Judgment reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.