COURT OF APPEALS
DECISION
DATED AND RELEASED

October 26, 1995

NOTICE

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.

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

No. 94-3243-FT

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

ALH COMPANY,

Plaintiff-Respondent,

v.

DR. GEORGE KRIWKOWITSCH,
AND BETTY THOMPSON,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Dane County: GEORGE NORTHRUP, Judge. *Reversed and cause remanded with directions*.

Before Eich, C.J., Sundby and Vergeront, JJ.

PER CURIAM. Plaintiff-respondent Anthony L. Haase d/b/a ALH Company (ALH) brought this action against defendants-appellants Betty Thompson and Dr. George Kriwkowitsch (Thompson) to recover for breach of a construction contract. Thompson countersued, claiming that ALH had failed to complete the contract.

The case was tried to a jury on July 25, 1994, which returned a special verdict in favor of ALH in the amount of $35,118.07. On October 24, 1994, the trial court denied Thompson's post-trial motions for a new trial and remittitur, or alternatively, a new trial.

On the issue which we find dispositive--admission of unfairly prejudicial testimony--appellants state the issue as follows: "Were questions and statement[s] concerning other lawsuits involving the Defendants, which were presented by Plaintiff at trial, unfairly prejudicial to Defendants necessitating a new trial in the interest of justice?"

The respondent presents the issue as follows: "Was evidence of other lawsuits against appellants regarding this construction project admissible to show appellants' intent or motive in abiding by their contract?"

We conclude that such evidence, presented by testimony of subcontractors, was unfairly prejudicial to appellants and requires a new trial.

At the outset, we make clear that our decision does not rest on the admission of evidence of disputes between appellants and subcontractors. The trial court allowed such evidence "for a very limited purpose"--to show a pattern of behavior or the appellants' motive in disputing the amounts due other subcontractors. Appellants do not contend this ruling was erroneous.

There are two steps which must be taken in determining whether evidence is admissible. First, evidence must be relevant. Section 904.02, STATS.; ***State v. Pharr***, 115 Wis.2d 334, 343, 340 N.W.2d 498, 502 (1983). Second, relevant evidence must be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or other considerations. Section 904.03, STATS.; ***Pharr***, 115 Wis.2d at 344, 340 N.W.2d at 502. We assume, without deciding, that evidence that appellants lost lawsuits initiated by other subcontractors was relevant. We conclude, however, that that evidence is not admissible, as the trial court determined when it decided the pretrial motion *in limine*, because its probative value is substantially outweighed by the danger of unfair prejudice. Without the latter evidence, the jury could infer that the dispute between the appellants and the subcontractors was genuine. However,

evidence that other subcontractors successfully sued appellants on their contracts was highly prejudicial.

At the hearing on appellants' pretrial motion, the court said:

> I'll grant the motion in broad, general terms....
>
> > *I'll prohibit any reference to the fact there were other lawsuits*, primarily because to the extent that if that just came out as a bare bones fact, a jury could interpret that as some sort of an admission by the defendants in the fact that it[] settled. *I think that that's highly prejudicial and inappropriate*.
> >
> > On the other hand, because of the interwoven nature of the lawsuits, it may well be testimony that indicates that there were differences or disputes between other contractors and the defendants.
> >
> > But, I don't know as if--at this point, I can't see why the jury would have to know that there was a lawsuit involved or that there wasn't. If that issue comes up, we'll have to deal with it during the trial.
> >
> > And it may be appropriate at the end of the case to just clarify it for the jury that their only concern is the dispute between these parties and that they shouldn't concern themselves, depending how the testimony comes out, with whether or not there were any claims by other parties.
> >
> > And we'll wait and see....

(Emphasis added.)

However, at trial, the court admitted testimony that appellants had been sued by other subcontractors and had lost. Appellants objected and moved for a mistrial. The trial court denied the motion, stating:

> [T]he plaintiff was not precluded from bringing out the fact that there were difficulties with some of the others initially while being paid, to the extent that the plaintiff felt that they could establish a pattern of bad faith on the part of the defendants, because that's one of the issues underlying this, is the intent of the parties and their actions. And so, to that extent, I felt that it was relevant.

The trial court did not, however, recede from its pretrial ruling that evidence of successful lawsuits by subcontractors against appellants was "highly prejudicial and inappropriate."

On cross-examination of Mrs. Thompson, counsel explored appellants' contract with Pat Culligan to do some ceiling repair work. Counsel then asked Mrs. Thompson the following questions and she gave the following answers:

> QAnd at least back in 1992, you didn't pay him for that work, did you?
>
> ANo.
>
> QAnd eventually, Pat Culligan had to bring a suit against you, didn't he?
>
> ....
>
> AYes.

The trial court overruled appellants' objection to this line of questioning, stating, "I think we need to make a further record on it. But, with the totality of the evidence as it is, I'm going to overrule the objection, allow it to be answered."

Counsel said he didn't wish to spend a lot of time on this issue, "because it isn't worth all of us listening to it. He was asking for more money than he claimed was owed, was he not?" Mrs. Thompson responded, "Yes."

Counsel then examined Mrs. Thompson with respect to the contract with Braun Electric. Counsel asked the following questions and Mrs. Thompson gave the following answers:

QNow, with respect to Braun Electric, I think on your one document you have that you paid them five thousand or a little less than five thousand for the electrical work in September of 1992?

AYes.

QAnd then, on your direct testimony, you said you paid them another check of $8500?

A Yes.

QWhen was that check written?

AI don't remember the date, but recently.

QJuly of 1994?

AYes.

Q*And that was a result of Braun ... bring[ing] a lawsuit against you, also*?

AYes.

(Emphasis added.)

Appellants' counsel objected and after a side-bar conference, the court instructed the jury that Thompson's testimony could be considered by the jury:

[T]o the extent that you feel that it shows any pattern of behavior, any motive in terms of the defendants as it relates to their relationship to the plaintiff, it's admissible. It's

> not admissible for any other purpose. It's not admissible to show any bad character, anything as such. And you shouldn't draw that type of general inference from it.
>
> And I want you to be very careful not to draw any wrong inferences from the testimony you've just heard or attach any other purpose to it.

Respondent argues that the evidence of appellants' breach of contract was so overwhelming that the testimony as to the other lawsuits could not have affected the outcome of the case. We hold that ALH may not make a "harmless error" argument because its counsel introduced testimony in violation of a court's pretrial order. Appellants should not be made to bear the risk that the jury's verdict may have been affected by testimony the trial court ruled was "highly prejudicial and inappropriate."

The court's instruction did not cure the possible prejudice to appellants from testimony that the subcontractors successfully sued appellants. To overcome that prejudice, appellants would have had to retry the subcontractors' lawsuits.

When it denied Thompson's motion for a new trial, the trial court recalled how it had ruled on appellants' pre-trial motion. The court said: "I said in general the evidence of other lawsuits is not going to come in. But, I also indicated that it may be admissible for some other purpose, depending how the case takes shape." The court said that the reason for its ruling was that it didn't want "this lawsuit and the jury in this case to get sidetracked by ... trying all those other lawsuits ...." We approve of the trial court's reasoning. To defend against this evidence would have required appellants to retry the lawsuits.

Appellants do not argue that testimony as to their disputes with other subcontractors was inadmissible; their sole argument is that evidence that some subcontractors had to sue appellants to get paid was highly prejudicial. We agree. Testimony as to the existence of a dispute would not be prejudicial because the jury would not be informed as to how the dispute was resolved. However, when appellants were forced to disclose that they had to pay the subcontractors in response to a lawsuit, that evidence was highly prejudicial

because it invoked the judgment of another jury or court as to appellants' liability. The highly prejudicial nature of that evidence was recognized by the trial court before the trial was commenced. We do not see how that evidence became less unfairly prejudicial during the trial.

ALH does not claim that appellants "opened the door" to such testimony. ALH would, however, impose the duty on appellants to "affirmatively show that such an admission [other lawsuits] was so prejudicial that the result of the unanimous jury verdict would have been different." Appellants did not have that responsibility. ALH violated the pretrial order when it asked appellants about other lawsuits; it had the burden to show affirmatively that such evidence could not have reasonably influenced the jury. Plainly, ALH has not made that showing. Appellants are entitled to a new trial.

By the Court.--Judgment reversed and cause remanded with directions.

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