

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

July 2, 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. 95-1772

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

**COMMERCIAL INDUSTRIAL SERVICES
OF MILWAUKEE, INC.,**

Plaintiff-Respondent,

v.

**FREDERICK H. GRIESHABER and
MILWAUKEE PRECISION CASTING, INC.,**

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM D. GARDNER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Frederick H. Grieshaber and Milwaukee Precision Casting, Inc., appeal from a judgment of the circuit court enforcing a materialman's lien in favor of Commercial Industrial Services of Milwaukee, Inc.

Milwaukee Precision argues that the following findings entered by the trial court are clearly erroneous: (1) a gas leak at Milwaukee Precision was not related to the work performed by Commercial; (2) the parties had an oral contract for installation of additional gas piping by Commercial; (3) the parties had an agreement to perform additional work on two boilers and a heater owned by Milwaukee Precision; and (4) there was insufficient evidence to support Grieshaber's counterclaim for slander of title. Grieshaber also argues that the trial court misused its discretion by not allowing him to recover his costs and disbursements incurred in defending the action brought by Commercial. We affirm.

Commercial is in the business of repairing and maintaining heating, ventilating and air conditioning systems. Milwaukee Precision manufactures precision castings and molds. Grieshaber is the president of Milwaukee Precision. After receiving a bid solicitation from Milwaukee Precision to perform certain work, Commercial sent a proposal letter to Milwaukee Precision outlining the amounts it would charge for the work solicited. The proposal called for a total payment of \$6400. Of that amount, \$4200 was to be allocated to the installation of natural gas line piping. The balance of \$2200 was payment for the installation of a Cleaver Brooks boiler, which Milwaukee Precision would supply. Grieshaber accepted the proposal on behalf of Milwaukee Precision.

Sometime after the installation of the piping, a gas leak developed. Commercial attempted to install the Cleaver Brooks boiler, but discovered upon inspection of the boiler that it was non-operational. Commercial invoiced Milwaukee Precision for the time spent inspecting the Cleaver Brooks boiler.

Rather than repair the Cleaver Brooks boiler, Milwaukee Precision asked Commercial to inspect another boiler, a York Shipley model. Upon inspection, Commercial determined that this unit was also not suitable. Commercial billed Milwaukee Precision for the amount of time it spent working on the York Shipley boiler. Milwaukee Precision also requested Commercial to examine a Hastings heater. Upon examination, Commercial discovered a large hole in the unit. Commercial billed Milwaukee Precision for the amount of time it spent examining this heater.

In addition to installing the gas piping provided for in the original contract, Commercial installed an additional forty-two feet of gas piping. Commercial billed Milwaukee Precision for the installation of this additional forty-two feet of gas piping.

Commercial invoiced Milwaukee Precision for payment of all services rendered, including the inspection of the two boilers and heater and for installing the additional forty-two feet of gas piping. When payment was not forthcoming, Commercial served a notice of intent to file a claim for lien on Milwaukee Precision. After thirty days passed with no payment of their invoices, Commercial filed a claim for lien against Milwaukee Precision and Grieshaber pursuant to § 779.06, STATS. Thereafter, Grieshaber filed a counterclaim against Commercial, alleging slander of title to his property.

The trial court entered judgment against both Milwaukee Precision and Grieshaber. After a successful motion vacating judgment, the trial court rendered a modification of judgment directing that judgment be entered only against Milwaukee Precision and that Grieshaber be dismissed from the case. Grieshaber, however, was denied costs and disbursements. Milwaukee Precision and Grieshaber's motion for reconsideration was subsequently denied.

Standard of Review

We employ the clearly erroneous standard when reviewing factual findings by a trial court. Section 805.17(2), STATS. This standard is essentially the same as the "great weight and clear preponderance" test. *Noll v. Dimicelli's, Inc.*, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). Under the "great weight and clear preponderance" test:

The evidence supporting the findings of the trial court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself

constitute the great weight and clear preponderance of the evidence.

Id., 115 Wis.2d at 643–644, 340 N.W.2d at 575, 577.

“When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.” *Cogswell v. Robert Shaw Controls, Inc.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). We conclude, for the reasons set forth below, that the trial court's findings of fact were not clearly erroneous.

1. *Gas Leak*

The record submitted before the trial court indicates that although both Grieshaber and the plant manager of Milwaukee Precision testified that they smelled gas sometime after Commercial completed its work, no evidence was presented as to the exact date on which they began smelling the gas. The only documentation regarding the repair of the gas leak was dated almost six months after Commercial installed the gas piping. Further, Milwaukee Precision presented no expert testimony indicating that the leaks were caused by Commercial's installation of the gas piping. In light of the evidence submitted, or lack thereof, the trial court's finding that the gas leak was not related to the work performed by Commercial was not clearly erroneous.

2. *Installation of Additional Piping*

The record indicates that the plant manager of Milwaukee Precision signed a field service report authorizing the installation of an additional forty-two feet of gas piping. Also, this employee testified that he was in contact with Grieshaber regarding the report and that Grieshaber did not object to the contents of the report. Further, the invoice sent to Milwaukee Precision described the work completed as “additional.” Based on the foregoing, the trial court's finding that an oral agreement existed between the parties for the installation of the additional forty-two feet of gas piping was not clearly erroneous.

3. *Boilers and Heater*

a. Cleaver Brooks boiler. The record indicates that after commencing work on the project, Commercial discovered that the Cleaver Brooks boiler provided to them was not functioning. The record also indicates that a field service report signed by Milwaukee Precision's plant manager authorized the inspection of the boiler. The record further indicates that the president of Commercial had numerous conversations with Grieshaber regarding the results of the inspection and at no time during these conversations did Grieshaber object to the testing. Therefore, the trial court's findings that Milwaukee Precision authorized the inspection are not clearly erroneous.

b. York Shipley boiler and Hastings heater. The trial court found that because the Cleaver Brooks boiler was incompatible, Milwaukee Precision requested that Commercial inspect another boiler, the York Shipley, as well as a heater for use in the project. This finding is supported by both the testimony of Grieshaber and Milwaukee Precision's plant manager. This finding is also supported by the fact that Milwaukee Precision's plant manager signed the field service report confirming and authorizing the work on the York Shipley boiler and on the heater. Because there is credible evidence supporting the trial court's findings that the parties agreed to this additional work, these findings are not clearly erroneous.

4. *Grieshaber's Costs and Disbursements*

Grieshaber argues that the trial court misused its discretion in denying him costs and disbursements. Although the trial court dismissed Commercial's claim as to Grieshaber personally, it declined to award costs and disbursements to him, concluding that it would be inequitable to make an award since he was so closely united-in-interest with Milwaukee Precision. We agree. A trial court's decision to award or disallow costs to a party is discretionary. *Chalk v. Trans Power Mfg., Inc.*, 153 Wis.2d 621, 634-637, 451 N.W.2d 770, 776-777 (Ct. App. 1989). This court will affirm a trial court's discretionary decision if there is any reasonable basis for it. *Littmann v. Littmann*, 57 Wis.2d 238, 250, 203 N.W.2d 901, 907 (1973).

Section 814.03(2), STATS., states:

Where there are several defendants who are not united in interest and who make separate defenses by separate answers, if the plaintiff recovers against some but not all of such defendants, the court may award costs to any defendant who has judgment in the defendant's favor.

There is sufficient credible evidence in the record to support the trial court's determination that Grieshaber was united-in-interest with Milwaukee Precision: (1) Grieshaber was president of Milwaukee Precision; (2) Grieshaber was the sole owner of Milwaukee Precision; (3) Grieshaber owned the building where Milwaukee Precision operated; and (4) Grieshaber signed the initial contract entered into between the parties. The trial court did not misuse its discretion in disallowing Grieshaber costs.

5. *Slander of Title Counterclaim*

Section 706.13(1), STATS., provides that:

In addition to any criminal penalty or civil remedy provided by law, any person who submits for filing, docketing or recording, any lien, claim of lien, lis pendens, writ of attachment or any other instrument relating to the title in real or personal property, knowing the contents or any part of the contents to be false, sham or frivolous, is liable in tort to any person interested in the property whose title is thereby impaired, for punitive damages of \$1,000 plus any actual damages caused thereby.

To prove a violation of § 706.13(1), a party must prove that a “knowingly false, sham or frivolous claim of lien or any other instrument relating to real or personal property” has been filed, documented or recorded against that party that impairs title. *Kensington Dev. Corp. v. Israel*, 142 Wis.2d 894, 902–903, 419 N.W.2d 241, 244 (1988). A party must also show a publication, which, in pertinent part, “plays a material or substantial part in inducing others not to deal with [that party]” and “results in special damages.” *Id.*, 142 Wis.2d at 902, 419 N.W.2d at 244. Grieshaber failed to meet his burden. There is no evidence in the record that shows that Commercial or any of its employees knowingly filed a false claim. Further, although Grieshaber argued that as a result of the filing of the lien he was solicited by numerous bankruptcy attorneys and people were reluctant to do business with him, Grieshaber produced no evidence that would indicate that he or Milwaukee Precision sustained any compensable damages as a result of the filing of the lien.

By the Court. – Judgment affirmed.

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