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

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No. 95-1779

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

ROBERT POTRATZ and
JAMES POTRATZ,

Plaintiffs-Respondents,

v.

STOKELY USA, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Winnebago County: ROBERT HAWLEY, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Stokely USA, Inc. appeals from a judgment in favor of Robert and James Potratz after a jury found that Stokely breached its contract with the Potratzes and that they suffered loss of expectation and consequential damages. On appeal, Stokely contends that the trial court erred in denying its motion for summary judgment, refusing to change answers in the special verdict and denying it a new trial. We disagree and affirm.

Stokely processes sweet corn from raw product at its plant in Pickett, Wisconsin. In the course of doing so, Stokely generates organic waste in the form of stalks, husks, cobs and kernels, which is commonly referred to as "corn silage" or "silage." Stokely entered into a contract in 1991 with the Potratzes for management of the corn silage stack at the plant.[1] The term of the agreement was from July 1, 1991, to June 30, 1995, unless terminated pursuant to the early termination provision of the contract, which states:

> Stokely may terminate this Agreement on any annual anniversary date by giving written notice to Potratz not less than 60 days in advance of its intention to terminate based upon either of the following conditions: (a) that it has elected to close the silage stack located at the Plant, or (b) that the silage stack at the Plant is out of compliance with any applicable law or administrative code.

After electing to close the corn silage stack site at the plant and making other arrangements for managing silage, Stokely availed itself of the early termination provision in an April 29, 1993 letter to the Potratzes terminating the contract as of June 30, 1993. The letter stated that the contract was terminated "for the reason that [Stokely] has elected to close its plant site silage stack. This date it has entered into an agreement with J & B Silage, Inc. for the development and construction of an off-site corn waste facility." The Potratzes filed a breach of contract claim in August 1993.

Stokely sought summary judgment on the grounds that it terminated the contract consistent with the early termination provision contained therein because it gave the Potratzes proper notice of its election to close the silage stack and acted consistent with this intention. The Potratzes opposed Stokely's summary judgment motion on the grounds that the contract was ambiguous and there were material facts in dispute as to the parties'

[1] Management involved stacking corn silage from the plant on a concrete pad located adjacent to the plant, disposing of leachate produced by the corn silage and leasing a loader to Stokely to be used to remove silage from the premises as it was sold by Stokely for animal feed or as green manure.

intention regarding the early termination provision. The trial court agreed with the Potratzes that the contract's early termination provision was ambiguous and denied summary judgment. Stokely challenges this ruling on appeal.

On appeal, we apply the same methodology used by the trial court and decide de novo whether summary judgment is appropriate. ***Coopman v. State Farm Fire & Casualty Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We review the parties' submissions on summary judgment to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. *See* ***Benjamin v. Dohm***, 189 Wis.2d 352, 358, 525 N.W.2d 371, 373 (Ct. App. 1994).

Summary judgment is inappropriate when the contract is ambiguous and the intent of the parties to the contract is in dispute. ***Leitzke v. Magazine Marketplace, Inc.,*** 168 Wis.2d 668, 673, 484 N.W.2d 364, 366 (Ct. App. 1992). While construction of a contract to ascertain the intent of the parties is normally a matter of law for this court, ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis.2d 105, 115-16, 479 N.W.2d 557, 562 (Ct. App. 1991), where a contract is ambiguous, the question of intent is for the trier of fact. ***Armstrong v. Colletti***, 88 Wis.2d 148, 153, 276 N.W.2d 364, 366 (Ct. App. 1979). Whether a contract is ambiguous in the first instance is a question of law which we decide independently of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. ***Id.***

In support of its summary judgment motion, Stokely submitted the affidavit of the plant manager, Russell Grubb. In his affidavit, Grubb stated that Stokely formed the intent in the fall of 1992 to close the silage stack site at the plant prior to the 1993 sweet corn pack. Stokely expected to contract with a third party to construct a silage stack pad and facility at a site away from the plant. It began negotiating in December 1992 with Robert Waldvogel and J & B Silage, Inc., and in April 1993 executed an agreement with Waldvogel which was consistent with Stokely's election to close the silage stack site at the plant prior to the 1993 sweet corn pack. The agreement required J & B Silage to select and develop a property as a corn waste disposal facility to serve the plant during the contract term. Because J & B was unable to construct a corn waste storage and disposal site in time for Stokely's 1993 sweet corn pack (which

began on August 6, 1993), the stack site at the plant was used for the 1993 corn pack.

Stokely contended on summary judgment that once it gave notice of its intention or election to close the silage stack, the fact that the stack was used during the 1993 corn pack was irrelevant under the clear language of the parties' contract, which, Stokely contended, unambiguously allowed it to terminate the agreement based upon its election to close the stack but did not require actual closure of the stack.

In response, the Potratzes argued that the term "elect" was ambiguous. They construed it to mean that silage stacking had ceased at the plant site—not that Stokely had merely elected to close the stack at some future date. In his affidavit opposing summary judgment, James Potratz stated that he and his brother relied upon representations made by Grubb that during the five-year term of the contract, the Potratzes had the exclusive right to manage the silage stack at Stokely as long as the stack was in use.

The trial court denied Stokely's motion for summary judgment on the grounds that the term "elect" was ambiguous and there were factual disputes regarding the parties' intent vis-a-vis the early termination provision. We agree with the trial court's legal conclusion that the provision ("[Stokely] has elected to close the silage stack located at the Plant") is reasonably susceptible to either meaning attributed by the parties and is ambiguous. *See* ***Wausau Underwriters***, 142 Wis.2d at 322, 417 N.W.2d at 916. In light of this ambiguity, the question of intent was for the trier of fact. *See* ***Armstrong***, 88 Wis.2d at 153, 276 N.W.2d at 366. Summary judgment was inappropriate because there were material facts in dispute regarding the parties' intent.

The remainder of Stokely's issues on appeal concern the jury's breach of contract verdict and the damages awarded to the Potratzes. The jury awarded the Potratzes $63,283 in loss of expectation damages and $10,000 in consequential damages. Stokely argues that there was insufficient evidence in the record that it breached the contract and that the Potratzes suffered loss of expectation and consequential damages in the amounts awarded by the jury.

Stokely's various challenges to the jury verdict and the trial court's refusal to overturn it hinge upon the facts found by the jury, *see* ***Logterman v. Dawson,*** 190 Wis.2d 90, 101, 526 N.W.2d 768, 771 (Ct. App. 1994), and whether the jury's verdict, including the damages award, is supported by any credible evidence. We examine the record for any credible evidence which under any rational view fairly admits of an inference that will support the jury's finding. ***Peissig v. Wisconsin Gas Co.,*** 155 Wis.2d 686, 702-03, 456 N.W.2d 348, 355 (1990).

The jury found that Stokely breached the July 1991 contract with the Potratzes. Stokely argues that there was no credible evidence which under any reasonable view supports this finding. In support of this claim, Stokely argues that the contract was unambiguous and not subject to construction using extrinsic or parol evidence. We have already held that at the summary judgment stage, the trial court properly concluded that the contract was ambiguous and that the parties' intent regarding early termination and Stokely's conduct in light of that intent was a question for the jury. We need not discuss this issue further except to say that it was for the jury to assess the credibility of the witnesses and the weight to be afforded their individual testimony. *See* ***Radford v. J.J.B. Enters.,*** 163 Wis.2d 534, 543, 472 N.W.2d 790, 794 (Ct. App. 1991). Where more than one reasonable inference may be drawn from the evidence adduced at trial, we must accept the inference drawn by the jury. ***Id.*** We search for credible evidence to sustain the jury's verdict, not for evidence to sustain a verdict which the jury could have reached but did not. ***Id.*** Because the contract was ambiguous on the question of whether Stokely actually had to close the silage stack in order to avail itself of the early termination provision, the jury's breach of contract finding need only be supported by credible evidence of the parties' intentions and conduct. The record contains such evidence.

We turn to Stokely's challenge to the damages awarded by the jury. The amount of damages awarded is primarily within the jury's discretion. ***White v. General Casualty Co.,*** 118 Wis.2d 433, 440, 348 N.W.2d 614, 618 (Ct. App. 1984). The jury awarded the Potratzes loss of expectation damages in the amount of $63,283 and consequential damages of $10,000.[2]

[2] On appeal, Stokely does not protest the $10,000 in consequential damages awarded

When a party's expectation interest is harmed by a breach of contract, damages for the breach should "put the plaintiff in as good a position financially as he would have been in but for the breach." ***Thorp Sales Corp. v. Gyuro Grading Co.,*** 111 Wis.2d 431, 438, 331 N.W.2d 342, 346 (1983) (quoted source omitted). The damages award should compensate the injured party for losses necessarily flowing from the breach. ***Id.*** "An injured party is entitled to the benefit of his agreement, which is the net gain he would have realized from the contract but for the failure of the other party to perform." ***Id.*** at 438-39, 331 N.W.2d at 346.

The Potratzes' Exhibit 29 offered evidence of their expectation damages, i.e., lost income or net gain from what would have been their 1993 contract performance. This exhibit showed that the Potratzes' gross income per ton of silage for the years 1991 and 1992 (the two years preceding the termination) and 1994 (the year subsequent to the termination) ranged from $2.76 to $3.51 and yielded an average gross income per ton of silage of $3.18. The Potratzes then applied this average gross income per ton to the number of tons Stokely processed in 1993, yielding a gross expected income in 1993 of $106,473. The jury awarded the Potratzes $43,190 less than this amount.[3]

Stokely argues that the Potratzes' 1993 compensation should have been calculated under the provisions of the contract,[4] not on average gross income per ton of silage. We disagree for two reasons.

First, in proving their expectation damages, the Potratzes were not limited to calculating their damages under the contract formula. Net gain under the contract is the benchmark when determining the benefit of an agreement which has been breached. ***Id.*** at 438-39, 331 N.W.2d at 346. While an injured party's damages may coincide with the agreed compensation, "if an

(..continued)
by the jury. Accordingly, we do not review this award.

[3] Stokely concedes that the cost of performing the contract had the Potratzes been allowed to do so in 1993 would have been $28,595.

[4] The contract provided that the Potratzes would be compensated at the rate of $44 per hour for each number of hours the plant operated, $100 per 6000 gallons of leachate removed from the plant and $3200 per month for the use of a loader to move silage.

injured party foreseeably would have realized profits from performing the contract, then lost profits should be considered in determining damages." ***Id.*** at 439-40, 331 N.W.2d at 347.

Stokely argues that the Potratzes' evidence of their lost gross income is incredible and speculative. However, the Potratzes were only required to provide "any reasonable approximation of the amount of that injury" as the measure of their damages. ***Id.*** at 441, 331 N.W.2d at 348. That the damages are approximate due to the Potratzes' inability to perform under the breached contract does not require overturning the jury's award. *See* ***id.***

Stokely complains that Exhibit 29 shows only the gross gain the Potratzes stood to realize from performing the contract in 1993 and the Potratzes did not present evidence of their costs of performing the contract had they been able to do so. However, Stokely concedes that the costs would have been $28,595 and the jury may have reduced the Potratzes' gross income calculation by more than this amount.

Second, the calculation of damages advocated by Stokely was based upon the actual amount of silage stacked, hours of plant operation and number of gallons of leachate removed from the stack in 1993. While these compensation factors are specified in the contract, the jury could have determined that the actual 1993 production figures were inconsistent with the manner in which the Potratzes had performed the contract in previous years.

When the Potratzes were managing the silage stack at the plant, they stacked the silage and disposed of leachate and Stokely sold the silage in the winter months. When Waldvogel managed the stack in 1993, he sold the silage on an ongoing basis, resulting in the development of less leachate at the stack site. The actual leachate figures for July to December 1993 indicate that 1,065,880 gallons were handled by Waldvogel. For the same months in 1991, almost 6,000,000 gallons of leachate were handled by the Potratzes. The jury may have relied upon this evidence to determine that the manner in which Waldvogel managed the stack was not the same manner in which the Potratzes managed the stack. Therefore, the jury may have determined that calculating the Potratzes' damages using Stokely's contract-based analysis would not have compensated the Potratzes for their lost net gain on the 1993 contract. In its

discretion, the jury may have concluded that the average gross income per ton calculation offered by the Potratzes was the most reasonable approximation of their damages.

We conclude that the jury's damages award is supported by credible evidence in the record and inferences therefrom. Therefore, the trial court did not err in declining to change the jury's damages award or to order a new trial.

By the Court.—Judgment affirmed.

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