COURT OF APPEALS DECISION DATED AND RELEASED

July 30, 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. 95-2483

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

CHROMIUM INDUSTRIES, INC.,

Plaintiff,

v.

MILWAUKEE BOILER MANUFACTURING COMPANY,

Defendant-Appellant,

PETER BURNO and BRIAN L. READ,

Defendants,

HARTFORD FIRE INSURANCE COMPANY,

Respondent.

APPEAL from an order of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed*.

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

WEDEMEYER, P.J. Milwaukee Boiler Manufacturing Company appeals from an order denying its motion to require payment of a judgment under a replevin bond issued by Hartford Fire Insurance Company. The amount of the judgment was determined in an arbitration proceeding between Milwaukee Boiler and Chromium Industries, Inc. The arbitrator resolved claims and counterclaims arising out of contracts for Milwaukee Boiler's fabrication of four industrial rolls for Chromium.

Milwaukee Boiler contends that the trial court erred when it concluded that the replevin bond did not obligate Hartford to pay the damages found by the arbitrator. It argues that the terms of the bond do not preclude payment under the facts and circumstances of the present case and that the trial court's denial of payment contravenes the law of the case. Alternatively, Milwaukee Boiler seeks reformation of the bond. We affirm the order of the trial court because the judgment for damages exceeds Hartford's obligation under the bond and because Milwaukee Boiler is not entitled to reformation.

Chromium filed the present action to obtain possession of a ninety-six-inch diameter industrial roll. Chromium intended to incorporate the roll into equipment it was manufacturing for a customer. According to the complaint, Milwaukee Boiler refused to release the roll until Chromium paid all amounts that Milwaukee Boiler claimed were due under several contracts. Chromium disputed both the amount that Milwaukee Boiler claimed and Milwaukee Boiler's right to retain possession of the roll.

At the hearing on Chromium's motion for an order of replevin, the parties negotiated a settlement. Milwaukee Boiler agreed to release the roll in exchange for a payment by Chromium and the posting of a replevin bond in the amount of $200,000. Milwaukee Boiler and Chromium clearly intended that the bond would cover any additional amounts due Milwaukee Boiler under contracts for fabricating the ninety-six-inch roll and four fifty-four-inch rolls. Additionally, the companies agreed to submit their dispute to arbitration. The terms of the settlement were recited into the record. Milwaukee Boiler and Chromium later submitted a written stipulation to which the replevin bond issued by Hartford was attached. The trial court entered an order consistent with the stipulation.

The replevin bond made Chromium and Hartford jointly and severally liable to Milwaukee Boiler for the amount of $200,000. The bond contained the following language relevant to our decision:

> KNOW ALL MEN BY THESE PRESENTS, That we [Chromium], as Principal, and [Hartford], ... as Surety, are held and firmly bound unto [Milwaukee Boiler], ... in the penal sum of $200,000 ... for the payment of which sum we do hereby, jointly and severally bind ourselves, our heirs, executors and administrators.
>
> THE CONDITION OF THIS OBLIGATION IS SUCH, That, whereas, on the Third day of June nineteen hundred and ninety-three (93) the said [Chromium] sued out of the circut [sic] Court of Milwaukee, aforesaid, a Writ of Replevin against [Milwaukee Boiler], Defendant, for the recovery of the following goods and chattels, property, to-wit:
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> (1) Ninety-six (96) inch diameter by 168 inch long face industrial roll.
>
> (3) Three 54 inch diameter by 390 inch long face industrial rolls.
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> Now if said [Chromium] shall prosecute his suit to effect, and without delay, and make return of said property, if return thereof shall be awarded, ... and in delivering said property to said plaintiff by virtue of said writ and pay all costs and damages occasioned by wrongfully suing out said Writ of Replevin, then this obligation to be void; otherwise, to remain in full force and effect.

The record does not contain any indication that Milwaukee Boiler objected to the bond.

Subsequently, Milwaukee Boiler and Chromium submitted their dispute to arbitration. In a lengthy decision, the arbitrator addressed their numerous claims regarding the fabrications of the four rolls, including responsibility for delays, additional charges, and work by third parties, as well as credits for payment. The arbitrator concluded that Chromium owed Milwaukee Boiler $92,413.62. The arbitrator's decision did not address who was entitled to possession of any of the rolls at the time the replevin action was filed.

Milwaukee Boiler filed a motion to confirm the arbitrator's award, enter judgment against Chromium, and require payment under the replevin bond. Only the payment under the bond was contested. Hartford argued that the bond did not cover damages for breach of contract. Holding that the bond's language was unambiguous, the trial court concluded that the bond did not cover any judgment for damages unless the judgment was for damages associated with wrongful acts arising from the replevin action itself. The trial court denied the motion to order Hartford to pay the judgment against Chromium.

The replevin bond is a contract. ***Bell Captain North Central, Inc. v. Anderson***, 112 Wis.2d 396, 402, 332 N.W.2d 860, 863 (Ct. App. 1983). Interpretation of an unambiguous contract presents a question of law, which this court reviews *de novo*. ***Id.***

The replevin bond issued by Hartford is a conditional, penal bond. *See* ***Milwaukee Enforcers, Inc. v. Ball***, 71 Wis.2d 298, 301, 237 N.W.2d 715, 716 (1976). It is similar to the one at issue in ***Bell Captain North Central, Inc. v. Anderson***, 112 Wis.2d at 402, 332 N.W.2d at 863. The language of the bond obligates the surety to pay a set sum, but the obligation is void if specified conditions are met. The court in ***Bell Captain*** interpreted the bond as creating a present liability that may be avoided by the satisfaction of a condition subsequent, ***id.*** at 403-04, 332 N.W.2d at 864, or, in the terminology of the RESTATEMENT (SECOND) OF CONTRACTS § 230 (1981), an event that terminates a duty.

The relevant conditions that would discharge Hartford's duty to pay were the prosecution of the replevin action, the return of the ninety-six-inch roll, if return was ordered, and payment of the costs and damages resulting

from the wrongful use of the writ of replevin. Because the parties did not continue the replevin action and determine which company was entitled to possession of the roll and the arbitrator's decision did not address this issue, the conditions for discharge have not and will not be met. Thus, Hartford's obligation on the bond continues.

This does not, however, resolve the issue of the extent of Hartford's obligation. The phrase "penal sum" generally means a penalty unless other language in the contract suggests that it was intended to refer to liquidated damages. ***City of Madison v. American Sanitary Eng'g Co.***, 118 Wis. 480, 502-03, 95 N.W. 1097, 1105 (1903). Where the language is a penalty, actual damages must be shown, ***id.***, with the amount of the bond providing the upper limit, *see* ***Wilhelm v. Hack***, 234 Wis. 213, 221, 290 N.W. 642, 645 (1940).

Further, the amount of damages is controlled, and limited, by the recitals expressed in the bond. ***Sanger v. Baumberger***, 51 Wis. 592, 593-94, 8 N.W. 421, 422 (1881). Here, the recital referred to the seizure of property "for the recovery of" the four rolls. Consequently, Hartford's obligation on the bond is limited to damages relating to possession of the rolls. These damages are the property's value and the loss resulting from the delay or deprivation of the property's use. *See* ***Bell Captain***, 112 Wis.2d at 403, 332 N.W.2d at 864 (purpose of replevin bond it to insure defendant is reimbursed if seizure is wrongful); LAURENCE P. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP 484 (1950). The damages claimed by Milwaukee Boiler, however, arise not out of possession, but out of its contracts with Chromium. Additionally, there is no basis for concluding that the value of the rolls is the same as the amount owed on the contracts. *See* ***Chrysler Corp. v. Adamatic, Inc.***, 59 Wis.2d 219, 243, 208 N.W.2d 97, 108 (1973) (value is price a purchaser willing, but not obligated, to buy would pay to a seller willing, but not obligated, to sell), *unrelated holding overruled by* ***Daniel v. Bank of Hayward***, 144 Wis.2d 931, 425 N.W.2d 416 (1988). Contrary to Milwaukee Boiler's contention, the terms of the bond do not obligate Hartford to pay the arbitrator's award.

Milwaukee Boiler presents two theories for requiring Hartford to pay the judgment regardless of the language of the bond. Milwaukee Boiler argues that because the order approving the stipulation and bond intended the bond to cover the arbitrator's award, the trial court's later refusal to allow recovery violates the law-of-the-case doctrine. This doctrine provides that legal

issues determined in a prior appeal are the law of the case and are binding precedent to be followed in successive stages of the same litigation unless there are compelling reasons for reconsidering the prior decision. ***Univest Corp. v. General Split Corp.***, 148 Wis.2d 29, 38-39, 435 N.W.2d 234, 238 (1989). There has been no prior appellate decision on the issue of Hartford's obligation under the bond so the law-of-the-case doctrine does not apply.

The general principle of comity recognizes that judges of coordinate jurisdictions sitting in the same court and in the same case should not overrule each other's decisions. The reasons underlying this policy are discussed at length in ***Commercial Union of America, Inc. v. Angelo-South American Bank Ltd.***, 10 F.2d 937, 938-40 (2d Cir. 1925). The decision to overrule a prior decision is left to the court's discretion. ***Dictograph Products Co. v. Sonotone Corp.***, 230 F.2d 131, 135-36 (2d Cir.), *cert. dismissed*, 352 U.S. 883 (1956) (overrules ***Commercial Union***'s absolute prohibition). In the present case, however, there is no basis for invoking this principle because the issue of whether the bond met its intended purpose was not presented to the trial court at the time of the first order. Milwaukee Boiler did not challenge the bond, and its counsel waived any notice that was required for the bond's approval.

We also reject Milwaukee Boiler's request for reformation of the bond. A court may reform a contract that, because of mistake or fraud at the time of execution, fails to evince the parties actual intent. ***St. Norbert College Found., Inc. v. McCormick***, 81 Wis.2d 423, 432, 260 N.W.2d 776, 780-81 (1978). If reformation is based on mistake, the mistake must be mutual, and a mistake by one party will not justify reforming the contract. ***Id.*** at 432, 260 N.W.2d at 781. Further, the mutual mistake must be proven by clear and convincing evidence. ***Id.*** In the present case, there is no evidence that Hartford knew of the special conditions that Milwaukee Boiler, Chromium, and the trial court contemplated for the bond or that Hartford intended to issue a bond that covered the condition. Without this evidence, there is no basis for reforming the bond.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

No. 95-2483 (D)

SCHUDSON, J. (*dissenting*). I agree with the majority's rejection of Milwaukee Boiler's arguments regarding the law of the case, and the reformation of the bond. I disagree, however, with the majority's conclusion that the terms of this bond do not obligate Hartford to pay.

The bond specifically covers "damages occasioned by wrongfully suing out said writ of *replevin*." As Milwaukee Boiler correctly argues:

> [T]his was a garden variety replevin action commenced and prosecuted by Chromium. In fact, the language of the Hartford Bond is nothing more than a recitation of the language of § 810.03. Under the terms of the Bond, Hartford (and Chromium) are jointly and severally bound to pay Milwaukee Boiler "all costs and damages occasioned by wrongfully suing out said Writ of Replevin." This is exactly what § 810.03 mandates. Under the statute, the Court is to approve a Bond "with sufficient sureties ... to secure ... payment to the defendant of such sum as may be recovered against the plaintiff" (i.e. "damages").
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> What actually was determined by the arbitration proceeding was that Milwaukee Boiler had *not* been wrongfully detaining the rolls from Chromium and that Chromium was not yet entitled to the property because of the amounts still owed by Chromium to Milwaukee Boiler. As a result, obtaining an Order (i.e. "Writ") of Replevin by Chromium was "wrongful" because Chromium was not yet entitled to possession at the time of the Replevin Order. Because Chromium obtained a Replevin Order at a time when Chromium was not yet entitled to possession of the property, Milwaukee Boiler was damaged as Milwaukee Boiler was required to relinquish property which Milwaukee Boiler was still, under the law, entitled to possess. Without the property, Milwaukee Boiler had no means available, but for the final determination of the replevin action

> and the security of the Bond, to recover the value of its property.

(Footnotes omitted.) The majority writes that "Hartford's obligation on the bond is limited to damages relating to possession of the rolls." Majority slip op. at 7. I agree. The majority, however, goes on to state that "[t]hese damages are the property's value and the loss resulting from the delay or deprivation of the properties use. The damages claimed by Milwaukee Boiler, however, arise not out of possession, but out of its contracts with Chromium." ***Id.*** (citations omitted). This, it seems to me, is a distinction without a difference. To say that the damages arose "not out of possession, but out of its contracts," is to superimpose a wholly artificial image on the actual understanding between Chromium and Milwaukee Boiler, and the bond they utilized.

There is no dispute that Chromium and Milwaukee Boiler intended the Hartford bond to cover these damages. The bond, by its explicit terms, accomplished exactly what they intended. Therefore, the trial court should have granted Milwaukee Boiler's motion to require Hartford to pay under the terms of the replevin bond. Accordingly, I respectfully dissent.