COURT OF APPEALS
DECISION
DATED AND RELEASED

NOVEMBER 21, 1995

No. 95-0393

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

INSURANCE SERVICES OF WAUSAU, INC., a Wisconsin corporation,

Plaintiff-Respondent,

v.

S & S INSURANCE SERVICES, INC.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Marathon County: ANN WALSH BRADLEY, Judge. *Affirmed*.

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. S & S Insurance Services, Inc., appeals a judgment that awarded Insurance Services of Wausau, Inc., $54,658.19 for breach of contract, plus $13,317.72 prejudgment interest, after a trial by jury. S & S contracted to sell some of its insurance agency accounts to ISW. Their Asset Purchase Agreement (APA) contained a formula to determine the sales price,

setting it at a multiple of the annual commission rate on policies in effect on the closing date. The parties essentially agreed that they intended this to mean the actual commissions received from September 1, 1988 to August 31, 1989, on the policies that were in effect on October 1, 1989, the planned closing date. On the actual closing date, October 16, 1989, the parties executed a Certificate of Agreed Upon Purchase Price. This document changed the operative date to October 16, 1989, for determining which policies went into the APA's sales price formula; it also set the sales price at $185,329.59 "as of" October 16, 1989. When ISW discovered sometime later that some policies it initially used in the APA's sales price formula had actually not been yielding ISW any commissions on October 16, 1989, it sued S & S for the difference between the certificate's $185,329.59 fixed sales price and $130,671.40, the amount ISW now recomputed as the correct sales price under the APA's formula.

S & S did not file motions after verdict. It therefore submits nearly all its appellate issues in terms of the interest of justice under § 752.35, STATS. S & S offers several arguments why we should exercise our discretionary power to reverse the judgment: (1) the certificate's fixed sales price superseded the APA's formula sales price, thereby setting the final sales price for the accounts, not only by virtue of the APA's and the certificate's plain terms, but also by virtue of a ruling we issued in an earlier appeal that had become law of the case; (2) the trial court improperly instructed the jury that it could elect to consider the two documents as one contract, depending on the evidence; (3) the trial court should have instructed the jury that both parties must assent to a contract; (4) the trial court violated the parol evidence rule by allowing extrinsic evidence to contradict unambiguous contracts; and (5) the evidence required an instruction on the duty fact finders have to construe ambiguous documents against the drafter. Outside the framework of its interest of justice argument, S & S argues that the trial court erroneously awarded ISW prejudgment interest. We reject these arguments and affirm the judgment.

Although we have the discretionary power to reverse judgments in the interests of justice, we exercise an extremely limited review in such appeals. We may reverse the judgment if the trial court proceedings did not try the real controversy or if they produced a miscarriage of justice. ***Hartford Ins. Co. v. Wales***, 138 Wis.2d 508, 517, 406 N.W.2d 426, 430 (1987). These tests are disjunctive. ***State v. Schumacher***, 144 Wis.2d 388, 401, 424 N.W.2d 672, 677 (1988). We may not reverse under the miscarriage justice prong unless we also conclude that the result was likely wrong. ***Id***. at 400-01, 424 N.W.2d at 676-77.

We may reverse under the real controversy prong without examining the probability of a different result so long as the trial court proceedings denied the jury a fair opportunity to decide the case by wrongly admitting or excluding important evidence. ***Id***. Here, most of S & S's arguments deal with the miscarriage of justice prong; only one deals with the real controversy prong. After reviewing the record, we are satisfied that a reasonable jury that considered the credible evidence would not reach a different result on retrial. A new jury on retrial would not likely find that the parties intended the certificate's fixed sales price to supersede the APA's formula sales price.

S & S has not definitively shown that the parties intended the certificate's fixed sales price to supersede the APA's formula sales price. First, the certificate itself was somewhat vague as to its purpose; it does not expressly state that the parties intended its fixed sales price to supersede the formula sales price. In fact, it restates the formula from the APA, clarifies the closing date, and sets $185,329.59 as the sales price "as of" October 16, 1989, the new closing date. At a minimum, the use of the expression "as of" implied that the fixed sales price was a provisional figure in the nature of a base point. Second, the weight of the other evidence did not decisively show that the parties intended the certificate's inclusion of a fixed sales price to resolve the sales price once and for all. Rather, the evidence, both direct and circumstantial, permitted an inference that the parties intended the certificate to serve as nothing more than a stopgap, best estimate of the sales price "as of" October 16, 1989 closing date, with the final sales price remaining dependent on an accurate inventory of the active polices in ISW's accounts and on an accurate application of the sales price formula to that inventory. Under these circumstances, we see no likelihood that a retrial would produce a different result. We now address S & S's remaining miscarriage of justice arguments to show that they do not alter this basic conclusion.

We first reject S & S's argument that the trial court improperly gave the jury the option, rather than the obligation, to consider the APA and the certificate as two parts of an integrated contract. First, as we noted above, the credible evidence did not decisively establish S & S's view of the certificate; it permitted an inference that the certificate's fixed sales price did not represent the final sales price. This left the jury freedom to consider the certificate in its proper perspective. Second, our prior decision did not declare the certificate to be a significant aspect of the parties' overall agreement. In reversing a summary judgment ruling, we held only that the certificate might have relevance and that

its potential relevance barred summary judgment; our ruling rested on the assessment that the summary judgment proceedings produced insufficient information to decisively resolve the matter. As a result, the trial court properly instructed the jury that, as the fact finder, it had the duty to determine whether the parties intended separate writings to form an integrated contract. The trial court also reasonably addressed a related issue when it declined to instruct the jury that the parties' contract required mutual assent for validity. The trial court covered the same overall concept in terms of intent; it ordered the jury to determine whether the parties intended the two writings to form an integrated contract.

We also reject S & S's argument that the trial court should have instructed the jury to construe the APA against ISW, who S & S alleges drafted it. First, S & S participated in the APA's preparation and therefore cannot transfer sole responsibility for the document's contents to ISW. Such facts do not create an inference that ISW included ambiguities in the APA in order to take advantage of S & S. Second, courts give that instruction when the one party has disparate bargaining power over the other. ***Goebel v. First Fed. Sav. & Loan Assoc.***, 83 Wis.2d 668, 675, 266 N.W.2d 352, 356 (1978). Here, the parties' bargaining powers were comparable, each having knowledge of and experience in the insurance business. Third, the evidence itself neutralized the inference that the instruction might have otherwise suggested. S & S insists that if the jury construed the APA against ISW, then the jury would have to resort to the certificate's fixed sales price to reach the correct sales price. But the evidence itself permitted an inference that the parties intended the APA's sales price formula to control the sales price and intended the certificate to provide merely a stopgap, modifiable base point, for temporarily implementing the formula, until the parties learned what insurance polices actually remained active in ISW's accounts on the closing date. Under these circumstances, the trial court had no duty to instruct the jury that ISW's status as the APA drafter made the certificate's fixed sales price controlling.

We also reject the one claim S & S raises that arguably implicates the real controversy prong. According to S & S, the way that the trial court tried the case effectively allowed the parties to improperly alter unambiguous documents, the APA and the certificate, with extrinsic parol evidence, including expert testimony on the meaning of the documents. Read together, the terms of the documents left conflicting inferences on what controlled the final sales price. Second, S & S's argument also mischaracterizes the nature of the trial evidence.

As we noted above, S & S has never decisively shown that the parties intended the certificate's fixed sales price to override the APA's sales price formula; the evidence permitted an inference that the certificate's fixed sales price was a stopgap, modifiable base point, which the parties intended to later change when they acquired additional information about the policies. In sum, the trial court correctly admitted extrinsic evidence to help the jury determine the parties' intent, without violating the parol evidence rule.

Finally, the trial court correctly awarded ISW prejudgment interest. Courts award such interest for reasonably ascertainable, measurable and computable claims. *See* ***Dahl v. Housing Authority for the City of Madison***, 54 Wis.2d 22, 31, 194 N.W.2d 618, 622-23 (1972). ISW's claim met this standard. This was not a case of intangible matters. ISW had a claim directly tied to the tangible results of the business' operations. Once ISW had identified the policies still active in its accounts on October 16, 1989, and the commissions they yielded, ISW could compute the transaction's correct sales price by application of the sales price formula to the newly available information. This made ISW's claim sufficiently ascertainable and fixed in amount to justify an award of prejudgment interest. The fact that the parties' contract set the sales price figure in terms of a floating number, rather than a fixed one, did not render ISW's claim nonascertainable for purposes of prejudgment interest; the parties' contract precisely fixed the rate at which the operation's revenues influenced the sales price, and its precision on this matter made ISW's final claim a simple matter of tallying and inventorying the active accounts, with reference to a specified date. As a result, ISW had a valid claim for prejudgment interest.

By the Court.—Judgment affirmed.

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