COURT OF APPEALS DECISION DATED AND FILED

October 14, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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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.**

No. 97-0431

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

L & M SEED COMPANY, INC. AND LYLE GROSSKREUTZ,

PLAINTIFFS-APPELLANTS,

V.

ELK MOUND FEED & FARM SUPPLY, INC. AND WILLIAM E. ZUTTER,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Dunn County: DONNA J. MUZA, Judge. *Affirmed.*

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

PER CURIAM. L & M Seed and Lyle Grosskreutz appeal a judgment awarding them contract damages of $845.91 and rescinding a consulting and noncompete agreement. They argue that (1) insufficient evidence supports the finding of breach of contract and damage award; (2) rescission is inconsistent

with a damage award; (3) the judgment results in unjust enrichment; (4) the liquidated damage clause is invalid as a penalty; (5) they substantially performed the contracts and did not refuse to provide services; and (6) the trial court erroneously computed the amount due on the contracts. We reject these arguments and affirm the judgment.

This action arises out of the sale of a seed business. After operating L & M as a feed and farm supply dealer for many years, Grosskreutz wanted to retire. He agreed to sell L & M to William Zutter, owner of Elk Mound Feed & Farm Supply, Inc. In October 1993, the parties entered into two agreements: (1) one for the sale of the business's assets; and (2) a consulting and noncompete agreement. Zutter signed two promissory notes in connection with the agreements, the first for $30,000 and the second for $17,065.37. Both were to be paid in installments over a five-year period.

The sales agreement provided that Grosskreutz would sell to Elk Mound the seed business known as L & M Seed Company, Inc., its goodwill as a going concern, its stock in trade, its lists of vendors and customers, a fifth-wheel trailer, a sewing machine/bag closer and all other property except cash. The consulting and noncompete agreement provided that Grosskreutz "would advise and consult solely for [Zutter and Elk Mound]" for a period not to exceed five years. His duties would include setting up seed deliveries each spring, checking on outstanding accounts and prospective purchasers, and making vendor contacts. He agreed not to directly or indirectly work for, advise, assist or in any other manner compete or become associated with any individual or group that competes with Elk Mound, except that he may continue to sell Top Farm products.

The consulting and noncompete agreement also provided:

> B. The parties agree that determining the actual damage that may be caused by Sellers' breach of this Agreement is presently, and may be in the future, difficult to determine. Therefore, the parties agree that in the event:
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> 1. Either of the Sellers [GROSSKRUETZ OR L & M] violates the Covenant-Not-To-Compete as set forth under C. below: or
>
> 2. **LYLE GROSSKRUETZ** refuses, without good cause, to render consulting services to Purchaser for a period not to exceed five (5) years as reasonably requested,
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> Purchaser may:
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> 1. Cease such payments called for under "A" above; and
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> 2. Receive from **LYLE GROSSKREUTZ and/or L&M SEED CO., INC.** fifty percent (50.00%) of the gross receipts of any individual, group, association or corporation with which Seller violates this Agreement under paragraph C.2. below for the term of this Agreement.

L & M and Grosskreutz initiated this action claiming that Zutter and Elk Mound failed to make payments as the notes required. Elk Mound and Zutter counterclaimed for breach of contract. The counterclaim alleged that L & M and Grosskreutz failed to provide consulting services, attempted to compete, failed to provide a complete list of customers and vendors and failed to disclose side agreements with customers, all in breach of the parties' contracts.[1]

The trial court found that L & M breached the contracts because it did not completely list all customers, did not transfer stock and failed to remove a sign that indicated that L & M was still in business. The trial court ordered rescission of the consulting and noncompete agreement.

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[1] We will refer to both appellants as L & M and both respondents as Elk Mound.

The trial court also found that Elk Mound had paid $33,749.46 on the notes, leaving a balance due of $13,315.91. It found that Elk Mound was entitled to $12,470 damages, and set off this amount against the balance owing on the notes. It concluded that a balance of $845.91 remained for Elk Mound to pay L & M as damages and entered judgment in favor of L & M.

First, L & M argues that there is no evidence that it competed with Elk Mound or that Elk Mound suffered any damages. We disagree. Findings of fact shall not be set aside unless they are clearly erroneous. Section 805.17(2), STATS. It is for the trial court, not the appellate court, to resolve conflicts in the testimony. ***Fuller v. Riedel,*** 159 Wis.2d 323, 332, 464 N.W.2d 97, 101 (Ct. App. 1990). It is not within the province of an appellate court to choose not to accept an inference drawn by a factfinder when the inference drawn is reasonable. *See* ***Onalaska Elec. Heating, Inc. v. Schaller,*** 94 Wis.2d 493, 501, 288 N.W.2d 829, 833 (1980). Appellate courts search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have but did not make. ***In re Estate of Becker,*** 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977).

Bernard Zutter, vice-president of Elk Mound, testified that he had personal knowledge that L & M continued to operate and that Grosskreutz solicited accounts and his son Mike sold the seed. He testified that Mike had been an officer of L & M and that Mike's warehouse was the warehouse Grosskreutz and Mike used for product distribution. Zutter testified that based on telephone orders, product had been sold to his former accounts, accounts Zutter had purchased. He testified that Grosskreutz was in competition with him, and that on numerous occasions he complained to Grosskreutz that he was not doing what he had agreed to do under the contract.

Although Grosskreutz testified that he performed a variety of services under the consulting and noncompete agreement, he also testified that during 1994 he was in the seed business with his forty-year-old-son, Mike.

> Q. And were you and Mike in business together?
>
> A. Kind of, yeah, in a way.
>
> Q. Well, were you partners, or did you have a formal relationship?
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> A. Not a formal relationship. I helped him. He helped me.

Grosskreutz's sign for L & M Seed Co., Inc., continued to be displayed at his son's warehouse. Grosskreutz testified that he and his son split profits from seed sales from Elk Mound. He would pay Elk Mound "so much for the seed, and then I resold the seed and made a small profit there." He further testified that he did not sell any seed under the name of L & M. However, he also testified that when he is selling Elk Mound seed, he could sell as L & M.

Whether the contract was breached presents factual determinations to be resolved by the trier of fact. ***Koenings v. Joseph Schlitz Brewing Co.,*** 126 Wis.2d 349, 358, 377 N.W.2d 593, 598 (1985). We conclude that the record supports the trial court's findings that Grosskreutz breached the consulting and noncompete agreement. The agreement provided that Grosskreutz would advise and consult solely for Elk Mound. Nonetheless, Grosskreutz testified that he would help his son in an informal way sell seed. Helping his son in his seed business violated the contractual provision that Grosskreutz would use his

expertise solely to advise Elk Mound and not assist any others in the seed business.[2]

L & M also argues that it substantially performed the contracts, by providing the assets and services required. Substantial performance is an equitable doctrine that acts as an exception to complete performance. *See* ***Klug & Smith Co. v. Sommer,*** 83 Wis.2d 378, 386, 265 N.W.2d 269, 272 (1978). The test for substantial performance is "whether the performance meets the essential purpose of the contract." ***Plante v. Jacobs,*** 10 Wis.2d 567, 570, 103 N.W.2d 296, 298 (1960). This argument recounts the various ways that L & M complied with the contracts. However, the trial court was satisfied that the contract breaches were not of mere details, but went to the contract's essential purpose. We must search the record for evidence to support the findings that the trial court made, not for findings that the trial court could have but did not make. ***In re Estate of Becker,*** 76 Wis.2d at 347, 251 N.W.2d at 435. Whenever witnesses give contradictory versions of the facts, the trier of fact has the duty of choosing the true version. *See* ***Fuller,*** 159 Wis.2d at 332, 464 N.W.2d at 101. The trial court was entitled to believe the testimony that Grosskreutz failed to list all customers and assisted his son in competing with Elk Mound, thereby failing to meet the essential purposes of the contracts.

We further conclude that the record supports the trial court's determination that Elk Mound was entitled to damages on its counterclaim in the sum of $12,470. Grosskreutz filed a 1994 corporate income tax return for L & M showing gross income in the sum of $24,941. He testified that he received interest

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[2] No challenge is made as to the validity of the noncompetition clause.

at 10% on the notes he received in connection with the sale of his seed business, but reported no interest income. He further testified that he would buy Elk Mound seed and sell it to his own customers. He estimated his gross sales at over $100,000. He also testified that he and his son would split profits from his son's seed sales.

The consulting and noncompete agreement provided that in the event of a breach, actual damages would be difficult to determine. It provided that Elk Mound was entitled to cease making payments under the agreement and receive 50% of gross receipts taken in as a result of the breach.

Grosskreutz argues that the sum reported represented payments made on accounts receivable for sales that occurred before he sold the business, and that accounts receivable were not part of the sale. This argument challenges the trial court's finding with respect to weight and credibility, which is not an appellate court function. The trial court is the arbiter of the credibility of witnesses, and its findings will not be overturned on appeal unless they are inherently or patently incredible, or in conflict with the uniform course of nature or with fully established or conceded facts. ***Chapman v. State,*** 69 Wis.2d 581, 583, 230 N.W.2d 824, 825 (1975). The trial court, as sole arbiter of the credibility of the witnesses, could reject the testimony that the sum L & M reported as income in 1994 was accounts receivable. The court was entitled to infer that the sum represented a share of the profits Grosskreutz admittedly received while assisting his son in his seed business. We conclude that the record supports the trial court's determination of $12,470 in damages awarded to Elk Mound.

L & M's next argument is based upon the election of remedies doctrine. It argues that the court cannot rescind the consulting and noncompete

agreement, and then rely on its terms for an award of damages, because the remedies are mutually exclusive. We conclude that the election of remedies doctrine does not preclude the relief awarded here.

The election of remedies doctrine is an equitable principle barring a party from maintaining inconsistent theories or forms of relief. ***Head & Seemann, Inc. v. Gregg,*** 104 Wis.2d 156, 159, 311 N.W.2d 667, 668 (Ct. App. 1981), *aff'd*, 107 Wis.2d 126, 318 N.W.2d 381 (1982). The doctrine, however, has "been the subject of much adverse criticism by courts and commentators because of the substantial injustice which frequently results from its application." ***Schwabe v. Chantilly, Inc.,*** 67 Wis.2d 267, 277, 226 N.W.2d 452, 457 (1975) (citation omitted). It is a "harsh, and now largely obsolete rule." ***Id.*** at 277-78, 226 N.W.2d at 457.

The trend has been to limit its application to avoid injustice. ***Id.*** The doctrine "*should be confined to cases where the plaintiff may be unjustly enriched or the defendant has actually been misled by the plaintiff's conduct or the result is otherwise inequitable or res judicata can be applied.*" ***Id.*** at 278, 226 N.W.2d at 457 (citation omitted; emphasis in original). "The real purpose of the doctrine is to prevent double recovery." ***Tuchalski v. Moczynski,*** 152 Wis.2d 517, 520, 449 N.W.2d 292, 293 (Ct. App. 1989).

There is no double recovery shown here. Although the trial court used the term "rescission," the court did not rescind the contract in the ordinary sense of the term, because it did not require that payments made under the contract be returned. The court did not attempt to put the parties in the position they would have been in had no contract been formed. Instead, the court found that there were breaches of contract and awarded damages.

Testimony at trial supported a finding that because of the contract breaches, Elk Mound lost the opportunity to sell directly to several accounts, thus suffering lost profits. Both parties had contemplated the difficulty of proving actual damages in the event of a breach and therefore contracted for a formula to be used to assess damages. We conclude that the trial court was entitled to call the contract at an end and apply the agreed upon damage clause in order to avoid an injustice. Because the trial court did not duplicate recovery, the election of remedies doctrine does not bar the relief ordered.

Nonetheless, L & M argues that to permit Elk Mound to retain the business assets would result in unjust enrichment. Unjust enrichment may be found when a benefit is conferred which the defendant appreciated or retained, under circumstances making it inequitable. *See* ***Watts v. Watts,*** 137 Wis.2d 506, 531, 405 N.W.2d 303, 313 (1987). The trial court's finding, that Elk Mound paid over $33,000 on the notes, is not challenged on appeal. Also, Grosskreutz testified that he never supplied a complete customer list, in spite of a sales contract requiring the conveyance of the customer list. L & M's unjust enrichment argument is not supported by record citation demonstrating an inequitable retention of a benefit by Elk Mound. We are unpersuaded that the circumstances support the claim of unjust enrichment argument.

Next, L & M argues that its breach of the consulting and noncompete agreement does not relieve Elk Mound of performing the sale of assets agreement.[3] We conclude that the trial court did not hold that Elk Mound

[3] L & M incorporates into this argument a challenge to the weight and credibility of the testimony arguing: "Essentially, the buyer has fabricated a default in February of 1995, which they try to use as an excuse to cease making any payments to sellers under either the Consulting And Covenant Not To Compete Agreement or the Agreement For Purchase of Assets." Because we already addressed this issue, we do not address it further.

was relieved of performing the sale of assets agreement. Instead, the court held that Elk Mound had paid a total of $33,749.46 on the total of $47,065.37 that was due on the two contracts, leaving a balance due of $13,315.91. It set off the damages awarded to Elk Mound on the counterclaim in the sum of $12,470. It ordered that Elk Mound was indebted to L & M in the sum of $845.91.

L & M argues the liquidated damage clause is penal in nature and unenforceable as a matter of law. We disagree. Although the validity of the liquidated damage clause is a question of law, the legal conclusion will frequently be derived from a resolution of facts or inferences. ***Wassenaar v. Panos,*** 111 Wis.2d 518, 523-25, 331 N.W.2d 357, 360-61 (1983). As a result, we should give weight to the trial court's decision, although it is not controlling. ***Id.*** at 525, 331 N.W.2d at 361. The party challenging the clause's validity has the burden of proving facts to justify the conclusion that the clause should not be enforced. ***Id.*** at 526, 331 N.W.2d at 361.

"The overall single test of validity is whether the clause is reasonable under the totality of circumstances." ***Id.*** Several factors are to be considered in reaching this determination: (1) is the clause intended as a penalty; (2) is the injury caused by the breach one that is difficult or incapable of accurate estimation at the time of contract; and (3) are the stipulated damages a reasonable forecast of the harm caused by the breach. ***Id.*** at 529-30, 331 N.W.2d at 363. Also, if the court finds that the nonbreaching party suffered no harm, the stipulated damage clause is considered to be a penalty. ***Id.*** at 537, 331 N.W.2d at 366.[4]

[4] In the event the trial court fails to make an express factual finding as to each factor, we may assume the finding was made in support of the determination or judgment. ***Yurmanovich v. Johnston,*** 19 Wis.2d 494, 499, 120 N.W.2d 707, 710 (1963).

We agree with the trial court that L & M has failed to meet its burden to show facts and circumstances to support its claim that the liquidated damage clause is invalid. At the time of the contract, both parties agreed that the estimation of damages in the event of a breach would be difficult. The contract language does not convey any intent that the clause be used as a penalty. Also, the amount of stipulated damages is related to the harm suffered, in that it is a percentage (50%) of the receipts taken in as a result of the breach. Further, Elk Mound offered testimony to support its claim that it suffered harm because it was denied the opportunity to sell directly to its own accounts. We conclude that the trial court could conclude the clause was reasonable under the circumstances.

Next, L & M argues that Elk Mound is not permitted by law to maintain an action for any breach of contract unless a demand for performance was made, citing WIS J I—CIVIL 3054. L & M concedes that Zutter testified that he complained to Grosskreutz on numerous occasions regarding his failure to perform the consulting and noncompete agreement. Nonetheless, L & M contends that other evidence suggests that Elk Mound had no complaint regarding Grosskreutz's performance of the agreement. L & M's argument misperceives our standard of review. It is for the trial court, not the appellate court, to resolve conflicts in the testimony. ***Fuller,*** 159 Wis.2d at 332, 464 N.W.2d at 101. We conclude that the record fails to support this claim of error.

L & M further argues that even if Grosskreutz refused to render the consulting service after February of 1995, his refusal would have been justified because Elk Mound had defaulted on its December 1994 payment. We conclude that this argument is without merit. The record indicates that during 1994, Grosskreutz helped his son Mike in Mike's seed business, and, as Zutter testified, essentially was in competition with Elk Mound. The trial court found that

L & M's gross sales as a result of the competition were reflected on its 1994 income tax return. The record fails to support this claim of error.

Finally, L & M challenges the trial court's computations of the amounts due on the contracts. We conclude that "[c]ommon sense and practical economic considerations of time, effort and money dictate that such 'mechanical' adjustments, if warranted, to the findings and judgment should first be allowed to occur at the trial court level." ***Schinner v. Schinner,*** 143 Wis.2d 81, 93, 420 N.W.2d 381, 386 (Ct. App. 1988). "Failure to bring a motion to correct such manifest errors properly constitutes a waiver of the right to have such an issue considered on appeal." ***Id.***

L & M argues that it attempted to clarify the amounts due at the time the trial court rendered its decision from the bench, but was interrupted by opposing counsel. ***Schinner,*** however, contemplates a motion for reconsideration under § 805.17(3), STATS. ***Id.*** at 93 n.4, 420 N.W.2d at 386 n.4. Here, the record discloses no motion but merely a discussion regarding the findings, with L & M contending that there was a total due of $47,065.37, in addition to a $30,000 figure paid for stock in trade.

The trial court found that more than over $47,000 was due to L & M, which was greater than the amount stipulated. However, on appeal, L & M now complains that the trial court should have found that an additional $30,000 is due on the purchase of the stock in trade.

Waiver is generally a rule of judicial administration which an appellate court may, in its discretion, choose not to apply. ***Id.*** at 94, 420 N.W.2d at 386. We conclude that the state of this record fails to support a justifiable basis to disregard the requirement of a trial court motion under § 805.17(3), STATS.

We further observe that counsel may have invited the alleged error in an earlier discussion during which counsel stipulated as to the amount due and owing on the notes. L & M stated: "And so if we add the principal and interest balance on both those notes through July 12th, 1996, it would come to $41,524.09." Counsel for Elk Mound agreed that was the correct calculation, and counsel for L & M stated: "Well, I think we can stipulate that those would be the amounts due under the notes subject to any successful setoff under the counterclaim." Elk Mound's counsel agreed, and the trial court found that it was so stipulated.[5]

By the Court.—Judgment affirmed.

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

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[5] Also, L & M's complaint alleges that it was entitled to "accelerate all balances due under the notes" and that "there is currently due a principal balance of $37,397.03 plus interest from January 1, 1995, on the remaining balance until time of payment." L & M requested judgment "for all amounts due under the agreements and notes attached" to the complaint.