COURT OF APPEALS
DECISION
DATED AND FILED

December 17, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-1444

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

BROWNING-FERRIS INDUSTRIES OF WISCONSIN, INC.,

PLAINTIFF-RESPONDENT,

v.

SUNDANCE PHOTO, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: MARIANNE E. BECKER, Judge. *Affirmed.*

NETTESHEIM, J. Sundance Photo, Inc. appeals from a trial court judgment ordering it to pay liquidated damages to Browning-Ferris Industries of Wisconsin, Inc. (BFI) for breach of contract. Sundance argues on appeal that because it did not have a written contract with BFI and because BFI materially breached the parties' later oral agreement, Sundance was excused from further performance. Sundance additionally argues that the liquidated damages

clause in the written contract is unreasonable under the circumstances and is therefore unenforceable. We reject Sundance's arguments. We affirm the judgment.

FACTS

Sundance is a large photo-processing company located in Jackson, Wisconsin. On November 18, 1988, Sundance entered into a written contract for waste disposal services with A-1 Services, Inc. The contract provided for an initial term of two years, a renewal term of two years and automatic one-year renewal terms thereafter unless either party gave written notice of cancellation sixty days prior to November 18, the anniversary date of the contract. Under its contract with A-1, Sundance would pay a fee of $310 each time A-1 picked up Sundance's dumpster and disposed of the waste.

In June 1989, A-1 went out of business and BFI purchased its assets and assumed its contractual obligations. David Dee, the technical supervisor at Sundance, was advised by a BFI representative that BFI was going to acquire A-1 and that BFI would continue to service Sundance at the rate contracted with A-1. While these arrangements were not reduced to writing, BFI continued to dispose of Sundance's waste for the next six years, until the summer of 1995. It is undisputed that Sundance timely paid all BFI invoices during that time.

In the early summer of 1985, Ted Gibson, a BFI representative, spoke with Dee at the Sundance processing plant. Gibson notified Dee that BFI would be increasing its waste disposal prices and that BFI desired a signed services agreement. During the course of this discussion, Gibson inquired about Sundance's arrangement for cardboard removal, a matter not covered by the parties' waste disposal agreement. Gibson suggested that Sundance also contract

with BFI for cardboard removal stating that BFI could pay Sundance a "much better rate." Sundance agreed to contract with BFI for the cardboard removal.

The problems giving rise to this action began shortly after BFI began servicing Sundance for cardboard removal in August 1995. Because of a problem with BFI's scales, BFI was not paying Sundance an adequate rate for the cardboard. After contacting BFI regarding the problems with the cardboard removal, Sundance stopped payment to BFI for the waste removal. When Sundance finally received payment from BFI for the cardboard, the payment did not reflect the number of loads actually removed by BFI or an accurate weight for certain loads. Dee testified that he contacted BFI repeatedly in an attempt to remedy the situation. Dee told BFI that Sundance would resume payments for the waste disposal as soon as the difficulties with the cardboard removal were resolved. Despite these ongoing problems, the anniversary date of the contract came and went on November 18, 1995, without either party providing the requisite advance notice for termination.

As a result of Sundance's refusal to pay for waste disposal, BFI sent Sundance a stop service notice on December 13. In addition, Ken Weller, BFI's district sales manager, telephoned Dee to inform him that waste disposal service was being stopped because Sundance had not complied with its contract. On December 18, Dee called BFI asking BFI to remove its dumpster from Sundance's property. BFI refused. Sundance then contracted with another waste disposal service. Later, when BFI paid Sundance for the money owed under the parties' cardboard agreement, Sundance paid BFI in full for the three months of missed payments under the waste disposal agreement. On December 20, 1995, Dee received a letter from Weller setting forth the terms for a proposed additional

one-year renewal term. Dee declined to sign the contract because he had already engaged the waste disposal services of another company.

On February 19, 1996, BFI filed a complaint with the small claims division of the Waukesha County Circuit Court. BFI claimed that Sundance had breached the contract for waste disposal by hiring another contractor. BFI sought damages in the amount of $3580.50 pursuant to a formula set out in a liquidated damages clause in the contract. A trial was held before a court commissioner on September 24, 1996. The commissioner found that Sundance breached the 1988 contract for waste disposal and ordered Sundance to pay the liquidated damages.

On November 11, 1996, Sundance requested and received a de novo trial in the circuit court. The trial court found in favor of BFI and entered a judgment ordering Sundance to pay $3757 to BFI. Sundance appeals.

DISCUSSION

1. Nature of the Contract

The first issue is whether the 1988 contract between Sundance and A-1 Services is enforceable by BFI against Sundance. This depends upon whether the contract between A-1 and Sundance was assignable to BFI when it purchased A-1.

Sundance argues that the contract was not assignable because it was a personal services contract. *See* ***Johnson v. Vickers***, 139 Wis. 145, 120 N.W. 837 (1909). Thus, Sundance concludes that the only contracts which existed between itself and BFI were the oral agreements entered into by Gibson and Dee for the continuation of waste hauling at $310 per load and the removal of cardboard. Sundance argues that because BFI breached this oral agreement by failing to meet the terms for cardboard removal, it was excused from further

performance. BFI maintains that the original contract between Sundance and A-1 was an ordinary business contract, not a personal services contract and, as such, the contract was properly assumed by BFI when it purchased A-1.

Whether a contract is one for personal services and is therefore assignable presents a mixed question of law and fact. We must therefore separate the factual determinations from the conclusions of law and apply the appropriate standard of review to each. *See* ***Meyer v. Classified Ins. Corp***., 179 Wis.2d 386, 396, 507 N.W.2d 149, 153 (Ct. App. 1993). We will not set aside findings of fact by a trial court unless they are clearly erroneous. *See* § 805.17(2), STATS. However, the application of the facts to a legal standard, here the assignability of a contract, is a question of law that we review independently of the trial court. *See* ***Meyer***, 179 Wis.2d at 396, 507 N.W.2d at 153.

"Generally, contract rights can be assigned unless they involve obligations of a personal nature or there is some public policy against the assignment." ***FinanceAmerica Private Brands, Inc., v. Harvey E. Hall, Inc.***, 380 A.2d 1377 (Del. Super. Ct. 1977) (citing WILLISTON ON CONTRACTS § 412 (3rd Ed.)). With respect to the 1988 contract, the trial court made the following findings:

> Sundance had a service agreement with A-1 which went back to November 17, 1988…. [The contract] provided on the first side the general terms, specially as applied to a container which was purchased, and then goes to the second side for the terms of contractor's duty for collection and waste collection. Contractor's duty was to collect and dispose of all waste material, garbage and such, period. And the customer's duty, basically, was to use the container, have things ready for the contractor. There was no right to approve who held the contract. This, in other words, is an assignable contract, and that is what happened. This is not a contract for personal service, such as is you hire Bob Hope to be the MC at a party and Douglas Feldon showed up, who has done two hours of stand up comedy

> work in his whole life. It is not that kind of contract. It centers on the job to be done, not who is to do it.

In support of its argument that the contract was for "personal services" and thus, not assignable, Sundance cites to ***Johnson***. There the court was asked to determine whether a contract to construct and equip a canning factory in accordance with detailed specifications could be assigned. *See* ***Johnson***, 139 N.W.2d at 148, 120 N.W. at 838. Because of the complexities involved in the construction, the court concluded that the "performance of the work undoubtedly required skill and experience, and upon its proper execution the success of the enterprise might well depend." ***Id***. The court further concluded that those contracting for the construction of the plant "having no knowledge themselves as to how such a plant should be constructed would naturally prefer to make their contract with a party having the requisite knowledge and experience rather than with persons having neither." ***Id***.

This case is distinguishable. Sundance contracted for the hauling and disposal of its waste. The contract was not dependent upon the personal skill or knowledge of A-1. Sundance does not argue that BFI lacked the requisite skill to dispose of its waste or was less qualified than A-1 to do so. Nor does it appear from the record that this was the case. It is undisputed that BFI continued to dispose of Sundance's waste for six years following BFI's assumption of the contract from A-1. This fact alone demonstrates that Sundance did not depend upon any skill or knowledge personal to A-1. Rather, Sundance depended on the job being done, not the unique skill or experience of the person doing it.

We conclude that the 1988 written contract between A-1 and Sundance was an ordinary business contract, not a personal services contract. As such, BFI was entitled to enforce the contract against Sundance.

2. Breach by Sundance

Since we have concluded that the contract was properly assumed by BFI, it logically follows that the contract remained in effect between BFI and Sundance until either party properly terminated it by giving the requisite advance notice. It is undisputed in this case that Sundance did not terminate the agreement by giving the required notice. Instead, Sundance simply ceased using BFI as its waste disposal server in December 1995 with eleven months still remaining on the contract. As a result, BFI lost Sundance as a customer and the revenue which Sundance would have generated to BFI. Clearly, Sundance's conduct was a breach of the contract which was then in effect.[1]

Sundance also claims that BFI breached the parties' agreement for cardboard removal, and this breach excused Sundance's obligation to perform on the waste disposal agreement. However, the cardboard agreement was a separate, side agreement struck between the parties. It concerned a matter not covered by the original contract for waste disposal. The breach by either party of the cardboard agreement did not affect the parties' obligations under the original contract.

3. Liquidated Damages

Last, we address Sundance's challenge to the liquidated damages clause in the contract. After finding a breach of contract, the trial court ordered Sundance to pay BFI liquidated damages in the amount of $3850 computed under a formula set out in the 1988 written contract. Sundance argues that the liquidated

[1] We acknowledge that Gibson advised Dee in the summer of 1995 that BFI would be raising its prices, and he sought a new written agreement to that effect. However, the parties never reached a new agreement. Therefore, the prior agreement remained in effect.

damages clause is invalid as a matter of law because it is unreasonable under the circumstances.

The review of a trial court's determination regarding the validity of the clause involves a mixed question of fact and law. *See* ***Koenings v. Joseph Schlitz Brewing Co.***, 126 Wis.2d 349, 358, 377 N.W.2d 593, 598 (1985). We will uphold the trial court's findings of fact underlying its legal conclusion unless they are clearly erroneous. *See* ***id***. However, whether the facts fulfill the legal standard of reasonableness is a determination of law which this court reviews de novo. *See* ***id***. We will nevertheless give weight to the trial court's determination on this issue. *See* ***id***.

A liquidated damages clause is unenforceable if the stipulated damages are grossly in excess of the actual damages. *See* ***Fields Found. Ltd. v. Christensen***, 103 Wis.2d 465, 475, 309 N.W.2d 125, 130-31 (Ct. App. 1981). Whether a liquidated damages clause is valid depends upon whether the clause is reasonable under the totality of the circumstances. *See* ***Wassenaar v. Panos***, 111 Wis.2d 518, 526, 331 N.W.2d 357, 361 (1983). The court may consider, among other things, the following factors in determining reasonableness: (1) whether the parties intended to provide for damages or for a penalty, (2) whether the injury caused by the breach is difficult or incapable of accurate estimation at the time of the contract, and (3) whether the stipulated damages[2] are a reasonable forecast of the harm caused by the breach. *See* ***id***. at 529-30, 331 N.W.2d at 362-63. The

[2] We note that the court in ***Wassenaar v. Panos***, 111 Wis.2d 518, 530, 331 N.W.2d 357, 363 (1983), refers to "stipulated damages." The court stated, "We use the term 'stipulated damages' herein to refer to the contract and the term 'liquidated damages' to refer to stipulated damages which a court holds to be reasonable and will enforce." ***Id***. at 521, 331 N.W.2d at 359. Because the parties to this case refer to "liquidated damages" under the contract, we do likewise.

burden is on Sundance, as the challenger to the clause, to prove that the clause should not be enforced. *See* ***id***. at 526, 331 N.W.2d at 361.

The contract at issue in this case contains the following liquidated damages clause:

> In the event Customer fails to perform its undertakings pursuant to this Service Agreement, the damages which Contractor will suffer are difficult to ascertain…. Therefore, Customer and Contractor agree that in the event Customer is found to be in breach of this Service Agreement and liable for loss or damage occasioned by the breach, Customer's liability shall be limited to an amount equal to 35% of the Service Charge Per Month or of the Service Charge Per Load, whichever is applicable, for each month or portion thereof the breach continues up to and including the number of months remaining in the initial Term and the Renewal Term of this Agreement.

The trial court determined that, in light of BFI's loss of a customer, the clause was reasonable. In its order for judgment, the trial court stated that "the liquidated damages clause as provided for in the original contract is not punitive, onerous or vindictive, and bears a reasonable relation to actual loss and is therefore enforceable under Wisconsin law." The trial court ordered Sundance to pay BFI a sum of $3850.50—35% of the per load price, $310, for the eleven-month period remaining on the contract.

Sundance argues under the first ***Wassenaar*** factor that the liquidated damages clause constitutes a penalty. It contends that the clause, when coupled with the automatic renewal provision, was "designed to discourage customers from canceling their service and indeed to promote inadvertent renewal for additional one-year terms, with liquidated damages imposed as a penalty if the customer realizes that the contract was unintentionally renewed." We are unpersuaded.

The automatic annual renewal provision was not effective until after the initial two-year term and after the first renewal term of two years. Thus, by the time the automatic renewal provision became effective, the customer and contractor would have an established business relationship presumably based on satisfactory service. Under the terms of the contract, the customer may provide notice sixty days prior to the anniversary date marking the renewal and thus cancel services without penalty. Or, if the customer is receiving inadequate services, the customer may at any time provide written notice to the contractor and if the problem is not remedied within ninety days, the automatic renewal will not take effect. Thus, the terms of the contract reflect a reasonable attempt by the contractor to protect its business interests and retain a customer while, at the same time, providing the customer with a reasonable means for terminating the agreement. We reject Sundance's argument that the liquidated damages clause constitutes a penalty.

Next, Sundance argues under the second ***Wassenaar*** factor that the actual damages suffered by BFI as a result of the breach were not difficult to ascertain. In addressing this argument, we will also address the third ***Wassenaar*** factor: whether the liquidated damages represent a reasonable forecast of the harm caused by the breach. *See* ***Wassenaar,*** 111 Wis.2d at 529, 331 N.W.2d at 363. Sundance does not expressly invoke this third factor, but we address it nonetheless since it is closely related to the second factor.

Sundance bases its argument on Weller's testimony that BFI's monthly profit on the Sundance account was $53.30. Thus, Sundance argues that BFI's losses over an eleven-month period are $564.30. However, BFI contends that its losses are not limited solely to its profits. BFI maintains that the liquidated damages additionally cover the costs associated with the loss of a customer

including the solicitation of new business. Weller testified that BFI's losses could not simply be calculated by multiplying the per load profit loss. Weller stated that "[b]y not having the account your costs go up, because you are splitting your fixed costs across fewer units."

With respect to the actual losses sustained by BFI, the trial court found that:

> [BFI] lost its benefits under the contract to keep the service going, to renegotiate the matter on or about November 18th, and to have the protection of the contract up and until that time it was renegotiated. The contract had eleven more months to run…. [The clause] is not punitive. It is to cover their loss for the period of time that they will have to go out and solicit another … contract to cover and readjust accounts.

The trial court's analysis is not only supported by Weller's testimony, but it makes sense. BFI suffered damages not only from the loss of Sundance's remaining payments but also from the indirect losses associated with the loss of a customer. The projection of the such losses at the time of the contract were difficult to ascertain and, as a result, the parties properly incorporated a liquidated damages clause into their agreement. Moreover, we conclude that the formula for computing those damages produced a reasonable forecast of the harm caused by a breach.

CONCLUSION

We conclude that the 1988 written contract between A-1 and Sundance was properly assumed by BFI and is enforceable against Sundance. We further conclude that Sundance breached the contract. Finally, we conclude that Sundance failed to establish that the liquidated damages provided for in the written

contract are unreasonable under the circumstances. We affirm the order of the trial court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.