**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 23, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 98-2596-FT**

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

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**GREEN VALLEY DISPOSAL CO., INC.,**

**PLAINTIFF-APPELLANT,**

**V.**

**SOILS AND ENGINEERING SERVICES, INC.,**

**DEFENDANT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Dane County: DANIEL R. MOESER, Judge. *Affirmed.*

ROGGENSACK, J.[1] Green Valley Disposal Co., Inc. (Green Valley) appeals from a judgment of the circuit court awarding it money damages for the unpaid portion of an October 1994 service contract between Green Valley and Soils Engineering Services, Inc. (SES), after concluding that the provision for

[1] This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

the length of the service agreement in a document the parties signed in May of 1997 was unconscionable; and therefore, unenforceable. We conclude that the October 1994 contract, as written, does not reflect the actual intent of the parties due to their mutual mistake about the contract's duration. We give force to the parties' actual intent and conclude that the May 1997 document was not a new service contract, rather it was a rate and frequency of collection change to the October 1994 contract which was still in force. SES terminated the 1994 contract when it gave notice of termination on September 4, 1997, and the circuit court correctly calculated the damages due Green Valley based on that termination. Therefore, we affirm.

## BACKGROUND

On October 18, 1994, SES entered into a written service contract with Green Valley whereby Green Valley agreed to remove waste from SES's premises once per week for a $70.00 per month payment. Green Valley drafted the contract, a one page document with printing on both sides of the page. Two paragraphs of the 1994 contract provide:

> **TERM.** This Agreement is a legally binding contract. Customer grants to Contractor the exclusive right to collect and dispose waste materials (including recyclables) pursuant to this Agreement for an initial term of three (3) years. This Agreement shall then be automatically renewed for an additional three (3) year term. Thereafter, unless either party gives written notice of termination to the other by Certified Mail at least sixty (60) days prior to the end of the renewal term, this Agreement shall be automatically renewed for like periods until terminated as provided above. The Schedule of Charges during any renewal period shall be adjusted to reflect increases or decreases in the Consumer Price Index since the prior renewal.

The contract also provides:

> **CHANGES.** Changes in the Schedule of Charges, frequency of collection service, number, capacity and type of equipment may be agreed to orally or in writing, by the parties. Consent to oral changes shall be evidenced by the actions and practices of the parties.

Despite the language contained in the term clause, both of Green Valley's agents, Edith Klimoski and William Bacher, testified that the service agreement was only three years in duration and that the automatic renewal was inapplicable, if a sixty-day notice was received prior to expiration of the initial three-year term. Octavio Tejeda, president of SEC, also understood that the 1994 contract was for three years.

From October 1994 to May 1997, Green Valley collected SES's waste, as agreed upon in the contract. During that time, Green Valley increased its rates. When Tejeda became concerned that Green Valley's charges were excessive, he contacted Green Valley and asked it to reduce the monthly charges. The parties agreed to adjust the frequency of service from every week to every other week and to reduce the monthly charge to $54.80. These changes were set forth on a form that had the same preprinted conditions as did the 1994 contract, which form was signed by Klimoski and Tejeda on May 1, 1997. Although Tejeda signed for the changes in the 1994 contract, it is uncontested that the parties never discussed increasing the length of time that the service agreement would run, nor did they discuss terminating the 1994 contract.

After SES agreed to the rate and frequency adjustment of the 1994 contract, Tejeda learned that another waste removal company was offering a lower rate for the same service that Green Valley was providing to SES. Tejeda contacted Klimoski and complained about Green Valley's rates. Tejeda continued to be dissatisfied with the service rate offered by Green Valley; and therefore, on

September 4, 1997, Tejeda sent Klimoski a letter advising her that SES was terminating its waste removal contract with Green Valley, effective August 31, 1997. SES paid for services through that date.

Green Valley sued SES to enforce what it contended was a right to provide services for an additional three years. On July 13, 1998, a trial was held during which Green Valley argued that the May 1997 document constituted a new contract which did not expire until May 1, 2000, at the earliest, and that SES had breached that agreement. The circuit court concluded that the paragraph governing the term of what Green Valley alleged was a new contract, commencing May 1, 1997, was unconscionable. It found that the paragraph governing the term of the agreement had been drafted by Green Valley in a "sneaky" manner because that paragraph described a six-year term, contrary to Green Valley's representations to its customers. Therefore, the circuit court concluded the extended term for the service agreement was unenforceable.

The circuit court then held that the October 1994 contract was enforceable, at the rates agreed to in 1997, as a three-year contract that could be terminated with a sixty-day notice. The court found that SES's September 4, 1997 letter notifying Green Valley that it would no longer need its services was a sixty-day termination notice. Based on that notice, the circuit court entered judgment in favor of Green Valley for $608.12, which represented the monthly charge, on a *per diem* basis, through November 4, 1997, statutory costs and partial attorney fees. Green Valley appeals.

## DISCUSSION

**Standard of Review.**

Whether a contract term is unconscionable is a question of law, which we review *de novo*. ***Leasefirst v. Hartford Rexall Drugs, Inc.***, 168 Wis.2d 83, 89, 483 N.W.2d 585, 587 (Ct. App. 1992).

**Unconscionability.**

Unconscionability has been referred to as "the absence of a meaningful choice on the part of one party, together with contract terms that are unreasonably favorable to the other party." ***Id.*** The relevant inquiry when determining questions of alleged unconscionability involves the examination of two categories of unconscionability: procedural and substantive. ***Id.*** A contractual term is deemed unconscionable when there is both a quantum of procedural and a quantum of substantive unconscionability. ***Kohler Co. v. Wixen***, 204 Wis.2d 327, 339-40, 555 N.W.2d 640, 645 (Ct. App. 1996).

Procedural unconscionability relates to inequalities between the parties that affect the meeting of minds, such as age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods or services in question. ***Discount Fabric House v. Wisconsin Tel. Co.***, 117 Wis.2d 587, 602, 345 N.W.2d 417, 425 (1984). Substantive unconscionability pertains to the reasonableness of the contract terms themselves. That is, do they unreasonably favor one of the parties. ***Id.***

There was no procedural unconscionability here. Tejeda is a civil engineer and has been associated with SES since 1976. As the president of SES, he is responsible for reviewing documents and reports, and he has entered into contracts on behalf of the company in the past. SES had alternative sources for obtaining waste disposal service, as evidenced by Tejeda's ability to obtain service from one of Green Valley's competitors in August 1997. Based on his age, education, intelligence, business experience, and choice in waste disposal services, Tejeda was in an equal bargaining position with Green Valley. That Green Valley drafted the 1997 document and did not explain its terms to Tejeda is insufficient to conclude that it was unconscionable because Tejeda, as a party with equal bargaining power, was not at a disadvantage in accepting or rejecting its terms. Therefore, we conclude that there was not a sufficient quantum of procedural unconscionability to tip the scales in favor of concluding that the May 1997 document was unconscionable.[2]

**Mutual Mistake.**

Although we conclude that the May 1997 document was not unconscionable, we nevertheless agree with the circuit court[3] that that document was unenforceable as a new service agreement because the October 1994 service contract was still in effect when the parties signed the May 1997 document and there was no meeting of the minds to extend that contract for an additional three

[2] We do not address whether there was substantive unconscionability because we conclude that there was no procedural unconscionability and a determination of unconscionability requires a quantum of both factors. ***Kohler Co. v. Wixen***, 204 Wis.2d 327, 340, 555 N.W.2d 640, 645 (Ct. App. 1996).

[3] We affirm on reasons other than those relied on by the circuit court because the record reveals support for the circuit court's conclusion. *See* ***State v. Horn***, 139 Wis.2d 473, 490-91, 407 N.W.2d 854, 861-62 (1987).

years. We reach this conclusion based on the undisputed intent of the parties with regard to the October 1994 contract and the findings of the circuit court.

When interpreting a contract, the goal is to ascertain the parties' intent, *i.e.*, on what terms did they agree. ***Goosen v. Estate of Standaert***, 189 Wis.2d 237, 246, 525 N.W.2d 314, 318 (Ct. App. 1994). Meeting of the minds does not require that parties must subjectively agree to the same interpretation at the time of contracting. ***Nauga v. Westel Milwaukee Co., Inc.***, 216 Wis.2d 305, 312, 576 N.W.2d 573, 576 (Ct. App. 1998) (citation omitted). Instead, mutual assent is judged by an objective standard, looking to the express words the parties used in the contract. ***Id.***

Mutual mistake, however, will excuse a party from the terms of an executed unambiguous written agreement. ***Id.*** at 313, 576 N.W.2d at 576. Mutual mistake occurs when both parties agreed on terms which were different from those set forth in the contract document. ***Id.*** at 313, 576 N.W.2d at 577. A mistake is not mutual if only one party failed to inform himself of the contents of the written contract; rather, mutual mistake requires that both parties labored under a common misconception with respect to the terms of the written instrument. ***Id.*** at 313-14, 576 N.W.2d at 577; ***Miller v. Stanich***, 202 Wis. 539, 543, 230 N.W. 47, 48 (1930). In such a situation, we will not enforce a contractual term to which neither of the parties assented. Instead, we will enforce the term intended by the parties as evidenced by their words and actions.

The 1994 service contract contained a paragraph which provided that the contract was for three years, with an automatic renewal for another three years. Thereafter, the contract automatically renewed unless either party gave a sixty-day notice of termination. Despite the language contained in the term clause, both of

Green Valley's agents, Klimoski and Bacher, stated that the service agreements they presented to their customers were for terms of only three years and that the automatic renewal was inapplicable, if a sixty-day notice of termination was received prior to expiration of the initial three-year term. Tejeda had the same understanding of the 1994 contract. Because both parties contracted under the mistaken belief that either party could terminate that agreement after three years provided the party gave sixty days notice, the written document does not accurately reflect the intent of the parties, and we will not enforce it as written.[4] Instead, we give force to the term to which the parties mutually assented and conclude that the parties agreed the October 1994 service contract would continue through October 17, 1997 and automatically renew for an additional three years, unless one of the parties gave a sixty-day notice of termination.

Prior to signing the May 1997 document, the parties discussed changing the rate and frequency of service, as is provided for in the 1994 contract, but neither party gave notice of termination. Tejeda testified there was no discussion of extending the parties' contractual relationship for an additional three years. That testimony is uncontradicted; and additionally, the record is void of any testimony that Green Valley and Tejeda ever discussed the termination of the 1994 contract. Because the initial three-year term had not expired and neither party had given notice of termination, the October 1994 contract was still in force when the parties signed the May 1997 document. Therefore, the May 1997 document is not enforceable as a new service contract; rather, it only amended the monthly cost and frequency of service under the October 1994 service contract.

[4] That the parties lived under the contract for nearly three years does not preclude our conclusion that there was a mutual mistake with regard to the term provision because neither party had cause to discover the mistake until the initial three-year term expired.

On September 4, 1997, Tejeda sent a notice of service termination to Green Valley and terminated the October 1994 service contract, as amended by the May 1997 document, effective November 4, 1997. The circuit court found his letter was a sixty-day notice under the 1994 contract and assessed damages[5] through November 4, 1997. The circuit court also found that the May 1997 document contained only credible evidence that SES consented to a rate and frequency of collection change as required by the changes clause of the October 1994 contract. We do not disturb the circuit court's findings of fact that are not clearly erroneous. Section 805.17(2), STATS.

## CONCLUSION

The October 1994 contract, as written, does not reflect the actual intent of the parties due to their mutual mistake about the length of time that contract was to be operative. Additionally, there is no evidence that the parties terminated the 1994 contract when they signed the 1997 document. Therefore, we give force to the parties' actual intent and conclude that the May 1997 document, although not unconscionable, was not enforceable as a new service contract because the October 1994 contract, as amended by the May 1997 agreement, was in force until SES validly terminated the contract in September 1997.

*By the Court.*—Judgment affirmed.

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

[5] The circuit court also awarded Green Valley costs and partial attorney fees; however, neither party appeals that part of the judgment.