COURT OF APPEALS
DECISION
DATED AND FILED

July 14, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP1203 **Cir. Ct. No. 2006CV614**

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

MERRILL IRON & STEEL, INC.,

PLAINTIFF-APPELLANT,

V.

CULLEN-SMITH, LLC,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Fond du Lac County: STEVEN W. WEINKE, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brown, C.J., Anderson and Snyder, JJ.

¶1 PER CURIAM. Merrill Iron & Steel, Inc. appeals from a judgment of the circuit court that awarded it damages against Cullen-Smith, LLC. Merrill argues that the trial court erred when it allowed Cullen-Smith to offset certain

charges against the money it owed Merrill. Specifically, Merrill argues that the circuit court erred: (1) when it allowed Cullen-Smith to recover "wear and tear" damages on cranes that Cullen-Smith leased but did not own; (2) when it allowed the contract between Merrill and Cullen-Smith to be modified by Merrill's silence; (3) when it admitted inadmissible hearsay evidence; and (4) when it declined to award Merrill attorney fees as the prevailing party. We affirm on the first three issues. As to the attorney fees, we reverse and remand the matter to the circuit court for proration in accordance with ***Shadley v. Lloyds of London***, 2009 WI App 165, 322 Wis. 2d 189, 776 N.W.2d 838.

¶2 This case arises out of the Camp Randall Stadium renovation project. Cullen-Smith was the construction manager for the project, and Merrill was a subcontractor hired to fabricate beams, columns, and trusses. During the course of the project, Cullen-Smith discovered problems with the beams Merrill had fabricated. Cullen-Smith fixed the problems with the beams, and then "back charged" Merrill for the costs by withholding some of the money it owed Merrill under the subcontract. Merrill then sued Cullen-Smith seeking recovery of about $200,000 in back charges and about $600,000 in damages caused by Cullen-Smith's delay in responding to "inquiries or notification" from Merrill regarding the feasibility of welds called for in the State's design plan.

¶3 Cullen-Smith then moved for, and won, summary judgment on the $600,000 in delay charge damages on the basis that delay charges were not available to either party under the terms of their subcontract. At the same time, Cullen-Smith conceded that some of its back charges were delay charges, and gave up its claim for about $125,000 of the total back charges. The case then went to a trial to the court on whether Cullen-Smith was entitled to retain $77,650 in remaining back charges. The court determined that Cullen-Smith was entitled to

retain the remaining back charges and to offset that amount against the amount Cullen-Smith had conceded was delay charges by deducting it from the amount owed Merrill. The court awarded Merrill about $125,000, but declined to award attorney fees because both parties had prevailed.

¶4 On appeal, Merrill argued in its brief-in-chief that the circuit court improperly allowed Cullen-Smith to recover wear and tear damages on a crane it did not own because Cullen-Smith did not present any evidence at trial of the diminished value of the crane. Cullen-Smith stated in its response: "Because of the extra time needed to fix Merrill's fabrication errors, the crane had to be rented for two months longer than scheduled, resulting in extra rental charges." Cullen-Smith also said the evidence showed that "Merrill's mistakes caused Cullen-Smith to incur additional charges for keeping the crane on site for an extra two months." In its reply brief, Merrill then argued that the extended crane rental was a "delay damage," and, consequently, was not allowed under the terms of the subcontract.

¶5 We asked the parties to file supplemental briefs with specific citations to the record addressing whether Merrill argued to the trial court that these charges for the crane were delay damages. Not surprisingly, Merrill asserts that it did raise the issue and Cullen-Smith argued that it did not. We conclude that Merrill did not raise the issue with sufficient prominence to preserve the issue for appeal.

¶6 We will not consider an issue raised for the first time on appeal. *See* ***Segall v. Hurwitz***, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983). Consequently, in order to preserve an issue for appeal, a party must establish that it "called [the error] to the attention of the trial court." ***Terpstra v. Soiltest, Inc.***, 63 Wis. 2d 585, 594, 218 N.W.2d 129 (1974). We will not "blindside trial courts

with reversals based on theories which did not originate in their forum." ***State v. Rogers***, 196 Wis. 2d 817, 827, 539 N.W.2d 897 (Ct. App. 1995). In its supplemental brief, Merrill points to one instance where it argued that the charges for additional use of the crane were prohibited delay charges. Merrill cites to the last sentence of ¶80 of its post-trial brief, in which it said: "In addition, if the lease were extended, that would be a delay claim barred by the no damage for delay clause."

¶7 We conclude that Merrill has not established that it called its objection to these charges to the trial court's attention by a single sentence at the end of paragraph in a lengthy document presented to the court at the end of trial.[1] Consequently, we conclude that Merrill has waived the argument that these charges were delay charges, and we will not consider the argument in this appeal.

¶8 Turning to the remaining issues, Merrill's first two arguments are that Cullen-Smith did not present evidence of the diminished value of the crane and that the circuit court erred by allowing the subcontract to be modified by Merrill's silence. These both are, at their core, challenges to the sufficiency of the evidence. A motion challenging the sufficiency of evidence to support a verdict should not be granted unless the court is satisfied that, considering all of the evidence and reasonable inferences from the evidence in the light most favorable to the party against whom the motion is made, there is no credible evidence to sustain a finding in favor of such party. WIS. STAT. § 805.14(1). This standard applies both to the trial court and to the appellate court reviewing the trial court's

[1] In its supplemental brief, Cullen-Smith also points out that Merrill made almost the identical statement in its motion for reconsideration. Again, however, this was too little too late.

ruling. ***Weiss v. United Fire & Cas. Co.***, 197 Wis. 2d 365, 388, 541 N.W.2d 753 (1995).

¶9 The evidence at trial showed that because of Merrill's fabrication errors, Cullen-Smith had to pay extra rental charges to keep a crane on-site, and that Cullen-Smith back charged Merrill for the extra crane rental based on average national rates that were less than Cullen-Smith's actual costs. We conclude that there was sufficient evidence to support the trial court's award on this claim.

¶10 Merrill also argues that all of the back charges were improper because the subcontract required that Merrill be notified of any errors in writing, which Cullen-Smith did not do, and because the subcontract contained a provision that the parties could not modify the contract except in writing. Merrill asserts that because Cullen-Smith gave oral rather than written notice, Cullen-Smith did not comply with the subcontract. Cullen-Smith responds that there was no written notification requirement in the subcontract, and even if there were, the issue is not whether the contract was modified, but rather whether Merrill waived the requirement of written notice by its conduct.

¶11 We agree that the issue presented is not whether the subcontract was modified, but whether Merrill waived the requirement by failing to object when it received oral and not written notification of errors. We conclude that Merrill did waive the requirement. Waiver of a contract term may be inferred from the conduct of the parties. *See* ***Christensen v. Equity Coop. Livestock Sale Ass'n.***, 134 Wis. 2d 300, 303, 396 N.W.2d 762 (Ct. App. 1986). The intent to waive may be inferred as a question of fact when the intent does not arise conclusively as a question of law. ***Id.*** "If more than one inference can be drawn from the credible

evidence, the matter is one for the trier of fact and will not be disturbed on appeal." ***Id.*** at 305.

¶12 The trial court found that the facts established that Merrill waived the written notice requirement by its conduct. The court found that Merrill's "contact man" on-site at the project was "advised orally" about the errors "and at no time during the project did Merrill ever object to the back charges or the manner in which the corrections made were transmitted to them," and "at no time did Merrill ever object to the method of notification being oral rather than written." This finding was supported by the evidence at trial, and we see no basis for disturbing it. We conclude that Merrill waived the written notification requirement of the subcontract by failing to object when it received oral notification of the errors.

¶13 Merrill also argues that the trial court erred when it admitted documents called back charge memos under the business records exception to the hearsay rule. Merrill argues that Cullen-Smith's back charge claim relied exclusively on these memos, and that Cullen-Smith did not prove all of Merrill's fabrication errors. In ***Kuhlman, Inc. v. G. Heileman Brewing Co., Inc.***, 83 Wis. 2d 749, 760, 266 N.W.2d 382 (1978), the Wisconsin Supreme Court concluded that similar back charge documents were admissible because they were made "at or near the time of the work," and they were based on information from people with first-hand knowledge. The evidence at trial in this case established these criteria for the back charge documents. The evidence showed that the documents were prepared in the normal course of business, at or near the time that the back charges were incurred, by a person with knowledge of the problems, and transmitted to the project executive in the regular course of business, who was the

custodian of these documents, and who testified at trial. We conclude that the trial court did not err when it allowed these documents into evidence.

¶14 The final issue Merrill raises is that because it was the only party to receive a damage award, the circuit court erred when it did not award it attorney fees. Under the terms of the subcontract, the prevailing party was entitled to recover its fees. When Merrill initiated the underlying action it sought about $600,000 in damages for delay charges and about $200,000 in back charges. Cullen-Smith was successful at summary judgment in getting the $600,000 in delay damages dismissed. After trial, the court awarded Merrill about $125,000 in damages based on the delay charges that Cullen-Smith conceded as a result of the summary judgment motion. Merrill, however, was not successful in obtaining the approximately $77,000 claim that was the subject of the trial. Cullen-Smith argues that "Merrill lost this case."

¶15 While it is true that Merrill lost at trial, it did recover something as a result of the litigation. In ***Shadley***, we held that a party is entitled to the proportion of its attorney fees that equates to its success at trial. ***Id.***, 322 Wis. 2d 189, ¶23. We conclude that the circuit court should have awarded attorney fees to both parties on a prorated basis. Consequently, we reverse the portion of the judgment that denied Merrill's request for attorney fees and remand the matter to the circuit court for a determination of the appropriate amount of prorated fees for both parties. On remand, the circuit court shall calculate the percentage on which each party was successful from the total amount of damages Merrill sought to recover. *See* ***id.***

¶16 For the reasons stated, we affirm the judgment of the circuit court except that portion addressing attorney fees. We reverse that portion and remand to the circuit court for a determination in accord with the decision.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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