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

**June 27, 2017**

Diane M. Fremgen
Clerk of Court of Appeals

**NOTICE**

**This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.**

**A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.**

**Appeal No. 2015AP1381** **Cir. Ct. No. 2014CV6143**

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

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**SEARS, ROEBUCK AND CO.,**

**PLAINTIFF-APPELLANT-CROSS-RESPONDENT,**

**V.**

**BAYSHORE TOWN CENTER, LLC, CORRIGAN HOLDINGS, INC., D/B/A CORRIGAN PROPERTIES INC., MALL PROPERTIES D/B/A/ OLSHAN PROPERTIES, HUNZINGER CONSTRUCTION CO. AND STEINER & ASSOCIATES,**

**DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS,**

**EPPSTEIN UHEN ARCHITECTS INC., HNTB CORPORATION AND GRAEF USA, INC.,**

**DEFENDANTS-RESPONDENTS,**

**DEVELOPMENT DESIGN GROUP, INC. AND GRAEF ANHALT SCHLOEMER FOUNDATION, INC.,**

**DEFENDANTS.**

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APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRENNAN, P.J. Plaintiff Sears, Roebuck and Co. appeals from an order granting summary judgment to defendants on negligence and breach of contract claims related to flooding at its Glendale store. Defendants are the Glendale store's current and prior landlords and their leasing agent (the landlord defendants), the project's developer (the developer), and the project's construction manager.[1]

¶2 Sears alleged in its complaint that defendants negligently constructed a nearby parking garage in a way that decreased the capacity of the storm drain. During a storm in July 2010 this decreased capacity was allegedly the cause of flooding that caused $679,849.00 in damage. Sears' second cause of action against all defendants was for alleged breach of "the applicable lease agreement provisions … when they failed to adequately compensate for the decreased capacity" of the storm drain.

[1] Sears initially sued four additional parties. One party, Development Design Group, was dismissed by stipulation. Three defendants, Eppstein Uhen Architects, Inc., GRAEF-USA, Inc., and HNTB Corporation, were granted summary judgment in a separate order dated May 20, 2015. This court dismissed Sears' separate appeal of that order on jurisdictional grounds because it was not timely filed. ***Sears, Roebuck and Co. v. Bayshore Town Ctr.***, No. 2015AP1381, unpublished slip op. and order at 5 (WI App Mar. 2, 2016). In this court's order, we stated that "[a]ny appeal [Sears] continues to pursue as to any of the Eppstein Uhen respondents is limited to the costs taxed [to GRAEF-USA] in the order entered on July 22, 2015." ***Id.*** at 5-6. In its briefing for this appeal, Sears made no argument as to the July 22, 2015 order, and we deem that issue abandoned.

¶3 All defendants cross-appeal the part of the order denying their claims for attorneys' fees. Defendant Hunzinger Construction Co., the project's construction manager, separately cross-appeals the part of the order denying its motion for sanctions against Sears pursuant to frivolous action statutes WIS. STAT. §§ 895.044 and 802.05 (2015-16).[2]

¶4 We affirm the grant of summary judgment because Sears provided no expert opinion that created a genuine issue of material fact as to the allegedly negligent acts of any individual defendant, and this is required to survive a summary judgment motion on a claim of professional negligence. *See* ***Baumeister v. Automated Prods., Inc.***, 2004 WI 148, ¶19, 277 Wis. 2d 21, 690 N.W.2d 1 (expert testimony required to establish duty and breach in a professional negligence claim against architect). Sears' breach of contract claim is premised on the same allegation as its negligence claim—"fail[ure] to adequately compensate" for the storm drain's decreased capacity caused by the construction—and because Sears' evidence creates no genuine issue of material fact on that point, we affirm summary judgment as to that claim as well.

¶5 We also affirm the part of the order denying attorneys' fees to defendants. Defendants rely on the enforcement provision from a settlement agreement that resolved previous litigation between these parties, but even assuming that the agreement was breached, that provision does not show that the parties agreed to pay attorneys' fees in the event of a breach. An agreement to pay attorneys' fees must be specific, and "we will not construe an obligation to pay

[2] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

attorneys' fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides." ***Hunzinger Const. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 340, 538 N.W.2d 804 (Ct. App. 1995). We decline defendants' request to carve out an exception in this case, which we note involves sophisticated parties familiar with drafting legal documents.

¶6 Finally, we conclude that the suit against Hunzinger, who was not party to the contract identified in the complaint as the basis for the contractual claim, was without a reasonable basis in law as described in the frivolous claims statutes, and Hunzinger is entitled to sanctions. *See* WIS. STAT. §§ 802.05 and 895.044. We therefore reverse that part of the order denying Hunzinger's sanctions motion and remand for a determination of the amount of the sanction.

## BACKGROUND

### The 2004 litigation and 2006 settlement agreement.

¶7 This case seeks damages related to flooding and property damage that occurred in 2010, but the focus of the case is the 2004 construction of a parking garage as part of a redevelopment project that reconfigured parking lots adjacent to Sears' store. Sears opposed the construction at the time, and all of the parties to this appeal were also parties to litigation over the construction in 2004. The 2006 settlement agreement that resolved the 2004 litigation thus plays a role in this case. The relevant provisions from the settlement agreement, to be discussed further below, relate to the release of future claims, the covenant not to sue, and enforcement. The parties dispute the significance of the agreement to this litigation, specifically whether it bars the suit altogether and whether it requires that defendants be awarded attorneys' fees in this action.

### The lease agreement.

¶8 Another document relevant to this case is the lease agreement. At all relevant times, the property was the subject of a lease agreement between Sears and the landlord defendants (Corrigan Holdings, Inc., until February 2, 2006, and Bayshore Town Center, LLC, thereafter). The relevant provisions are simply the ordinary obligations of the landlord to maintain the common areas of the property and the "storm and sanitary sewer facilities" in "proper working order."

**Sears' complaint and expert report, deposition and supplemental affidavit.**

¶9 The complaint, filed July 21, 2014, alleged that during a storm on July 22, 2010, Sears' store in Glendale was flooded, and the store sustained damage as a result. Sears sought damages from all defendants on the grounds of professional negligence, without identifying which professional was negligent, and breach of contract, without identifying which defendants were parties to the contract allegedly breached. The complaint attached the lease and specifically cited the provisions mentioned above.

¶10 Following a December 4, 2014 scheduling conference the trial court set a January 19, 2015 deadline for expert witness reports and a February 27, 2015 deadline for dispositive motions. No party objected to the scheduling order or deadlines.

¶11 Sears submitted just one expert witness report related to liability, and two related to damages. The report on liability had been prepared July 21, 2011, by consulting engineer John R. Krewson, and it included the following statements and opinion as to breach, causation and damages:

> 2. The construction of the parking garage in 2004 resulted in significant changes to the storm drainage and topography adjacent to the Sears store where the flooding occurred and specifically impact the area where the flooding originated. These changes greatly reduced the capacity of the drainage

> system to control the runoff in the area and increased the potential for flooding.
>
> 3. No changes were made to compensate for the decreased capacity of the storm drain resulting from the changes in elevation due to construction of the garage.
>
> Based on the above, it is our opinion that there is a high probability that flooding of the Sears store would not have occurred had the storm drainage and the ground elevations in the area not been raised by the construction of the [parking garage], or if flooding did occur, the depth of flooding would have been such that it could have been controlled by the Sears store staff with normal methods available at the time.

¶12 In Krewson's February 20, 2015 deposition, he was asked by counsel for each of the defendants for his opinion as to the negligent acts of that particular defendant. Krewson stated that he had no knowledge of the roles, if any, that defendants played in the redevelopment project. As to Steiner, the developer, Krewson stated that he did not think he had mentioned Steiner in his report and otherwise commented only, "I think they're the developer[.]" As to Hunzinger, the project manager, Krewson was asked, "Do you know what role Hunzinger played in this project?" and he answered, "I do not." Asked if he had "criticism" of Hunzinger, Krewson answered, "No." As to the landlord defendants, when Krewson was asked to confirm that he did not intend to offer an opinion about any role that Bayshore Town Center, LLC, Corrigan Holdings, Inc., Mall Properties, Inc., or Olshan Properties played in the redevelopment project, he answered, "[t]hat's correct."

¶13 On April 1, 2015, after the deadline for filing expert reports, after the discovery deadline, after the defendants filed summary judgment motions and after Hunzinger's motion for frivolous claims sanctions including attorneys' fees,

Sears filed a supplemental affidavit of its liability expert, Krewson, which stated in relevant part,

> [W]ithout reviewing specific documentation and data from each Defendant, I am of the opinion that any negligent work regarding the storm water system would most likely have been performed by a civil and/or design engineer. It would also have been impacted by other defendants through work and decisions made regarding planning, cost and value engineering.

Krewson further averred that he had "not had sufficient time to review the necessary documents obtained through discovery in order to form a firm opinion regarding the specific conduct of each Defendant" and that he needed "additional information[.]" Sears filed no motion for extension of discovery or expert report deadlines.

**The counterclaims, summary judgment motions, and sanctions motion.**

¶14 The defendants who were parties to the 2006 settlement agreement[3] counterclaimed against Sears for breach of the covenant not to sue contained in that agreement and sought attorneys' fees as consequential damages from the alleged breach. The defendants all filed summary judgment motions on March 2, 2015.

¶15 On March 11, 2015, Hunzinger sent Sears a draft of its motion to pursue sanctions under the frivolous claims statutes. Sears failed to respond, and Hunzinger filed its motion on April 9, 2015. It asked the court to strike the

[3] These defendants are Bayshore Town Center, LLC, Corrigan Holdings, Inc., d/b/a Corrigan Properties Inc., Mall Properties d/b/a/ Olshan Properties, Hunzinger Construction Co. and Steiner & Associates. *See* above ¶1, n. 1.

complaint as a frivolous filing and order Sears to pay all of Hunzinger's attorneys' fees and costs.

**The motion hearing and the rulings.**

¶16 At the motion hearing, the trial court heard argument and ruled as follows: (1) it granted summary judgment dismissing all of Sears' claims; (2) it denied defendants' motion for attorneys' fees and (3) it denied Hunzinger's motion for sanctions.

¶17 Additional facts will be included as necessary.

## DISCUSSION

### I. Sears failed to establish a genuine issue of material fact on its negligence and breach of contract claims.

A. Standard of review and principles of law

¶18 Summary judgment is used to determine whether there are any disputed issues for trial. ***U.S. Oil Co., Inc. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). Appellate courts and trial courts follow the same methodology. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). First, the pleadings are examined to determine whether they state a claim for relief. ***Id.*** If they do, and if the responsive pleadings join issue, the court must then examine the evidentiary record to determine whether there is a "genuine issue as to any material fact," and, if not, whether a party is thereby entitled to "judgment as a matter of law." WIS. STAT. § 802.08(2). The well-known purpose of summary judgment is "to avoid trials where there is nothing to try." ***Rollins Burdick Hunter of Wis., Inc. v. Hamilton***, 101 Wis. 2d 460, 470, 304 N.W.2d 752 (1981).

¶19 "The ultimate burden … of demonstrating that there is sufficient evidence … to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion." ***Transportation Ins. Co., Inc. v. Hunzinger Const. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136 (Ct. App. 1993).

> [O]nce the moving party demonstrates that the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law," [WIS. STAT.] § 802.08(2), the opposing party may avoid summary judgment only by "set[ting] forth specific facts showing that there is a genuine issue for trial," [WIS. STAT.] § 802.08(3).

***Id.*** at 291.

¶20 "[O]nce sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Id.***, at 291-92. "The party moving for summary judgment need only explain the basis for its motion and identify those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' that it believes demonstrate the *absence* of a genuine issue of material fact." ***Id.*** at 292 (emphasis added).

¶21 Although the pleadings under consideration here may state claims for relief against all defendants,[4] an issue we do not decide here, and thus arguably

[4] We separately address the breach of contract claim against Hunzinger below.

clear the first hurdle of the summary judgment methodology, they certainly do not clear the second. *See* ***Green Spring Farms***, 136 Wis. 2d at 315.

B. The negligence claims against all defendants.

¶22 "The elements in a cause of action for negligence are: (1) a duty of care on the part of the defendant; (2) a breach of that duty; (3) a causal connection between the conduct and the injury; and (4) an actual loss or damage as a result of the injury." *See* ***Erickson v. Prudential Prop. and Cas. Ins. Co.***, 166 Wis. 2d 82, 88, 479 N.W.2d 552 (Ct. App. 1991). As against each of the named defendants, Sears has the burden of production and proof on these elements on its claims of negligence. Expert testimony is required to survive a summary judgment motion on a claim of professional negligence. *See* ***Baumeister***, 277 Wis. 2d 21, ¶19 (expert testimony required to establish duty and breach in a professional negligence claim against architect).

¶23 Sears' complaint identifies the negligence of the defendants by simply lumping all defendants into a group and generally alleging negligence, as follows:

> That Defendants had a duty to use reasonable care in the construction of the parking garage.
>
> That Defendants breached their duties of care by negligently and carelessly constructing the parking garage and specifically, by failing to compensate for the decreased capacity of the storm drain, which was a result of the changes in the elevation due to the construction of the parking garage.
>
> That Defendants' negligence was the direct, proximate and foreseeable cause of the water damage.
>
> That as a direct and proximate result of Defendants' negligence, Plaintiff sustained damages ….

Nowhere does Sears allege any individual defendant's acts of negligence.

¶24 To survive summary judgment, Sears had the burden of "mak[ing] a showing sufficient to establish the existence of an element essential" to its case. *See* ***Transportation Ins. Co., Inc.***, 179 Wis. 2d at 292. However, Sears submitted no evidentiary material that raised a genuine issue of fact concerning the standard of care applicable to each defendant's acts in the construction of the parking garage or concerning any breach of that defendant's standard of care, much less causation as to the defendant's acts.

¶25 Sears asserts that Krewson's testimony, report and affidavit fulfilled its obligation to provide support for its allegation of professional negligence. We disagree. Sears' expert's report did not state the applicable standard of care as to any individual defendant, or state how the individual defendant's acts breached its duty, or caused the damage. In fact, in his deposition, Sears' expert opined that he had no criticism of the work done by any of the individual defendants and indeed did not generally know what role they had played in the construction.

¶26 In its brief opposing summary judgment, Sears made several additional arguments about the sufficiency of its proof.[5] First, Sears argued that the reason its expert did not have an opinion as to negligence was that the expert's deposition was taken before Sears had received answers on all discovery. That is true, but Sears had years to update Krewson's report and did not do so. Sears

[5] One of the arguments Sears raised at summary judgment for the first time, the reasonable use doctrine, we need not address because even if it is applicable in the negligence context presented here (and there is some ambiguity about that—*see* ***Hocking v. City of Dodgeville***, 2009 WI 70, ¶21 n.7, 318 Wis. 2d 681, 768 N.W.2d 552), Sears' reliance on the doctrine fails for the same reason that its negligence claim fails—the insufficiency of proof as to any specific acts of negligence by any defendant—as we discussed earlier in this section.

never objected to the scheduling order deadlines or requested extensions for filing additional expert opinions. In fact the record showed that it did not even serve its first discovery requests on defendants until a day after its expert's deposition. "[O]nce sufficient time for discovery has passed, it is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing sufficient to establish the existence of an element essential to that party's case.'" ***Transportation Ins. Co., Inc.***, 179 Wis. 2d at 291-92. That time had passed, and Sears did not carry its burden.

¶27 Second, Sears argued that the expert's role was to determine "the cause of loss" and not "to make legal conclusions as to the negligence of each party." Sears is mistaken.[6] *See* ***Baumeister***, 277 Wis. 2d 21, ¶19.

¶28 Thus, there is "no genuine issue of material fact" as to whether that standard of care was breached by defendants' actions, and defendants were entitled to judgment as a matter of law. Accordingly, summary judgment on the negligence issue was required.[7]

[6] Sears also misleadingly cited in its trial court brief and in its brief to this court to ***Kinnick v. Schierl, Inc.***, 197 Wis. 2d 855, 872, 541 N.W.2d 803 (Ct. App. 1995), for the proposition that "a court may not, without erroneously exercising its discretion, grant summary judgment when an opposing party shows by affidavit that he or she cannot at that time present by affidavit facts essential to justify his or her opposition." We note that this citation is from a dissenting opinion, and the dissenting opinion is not citing to any controlling legal authority.

[7] The trial court granted summary judgment to these defendants on other grounds as well, based on its conclusion that the 2006 settlement agreement barred this litigation. We conclude that Sears' negligence claim fails as a matter of law and this disposes of the case, so we need not reach those arguments. An appellate court should decide cases on the narrowest possible grounds. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989). Likewise, we do not reach defendants' arguments that the negligence claim is barred by the act of God doctrine or by public policy.

C. The breach of contract claims against all defendants.

¶29 A breach of contract claim requires proof of three elements: (1) "a contract between the plaintiff and the defendant"; (2) "failure of the defendant to do what it undertook to do"; and (3) damages. *See* ***Brew City Redevelopment Grp., LLC v. Ferchill Grp.***, 2006 WI App 39, ¶11, 289 Wis. 2d 795, 714 N.W.2d 582.

¶30 Sears based its breach of contract claim on the lease agreement and alleged that each defendant violated the lease by failing to prevent the flooding. The complaint states, as relevant to the breach of contract claim, "[T]hat Defendant(s) breached the applicable lease agreement provisions, as stated above, when they failed to adequately compensate for the decreased capacity" of the storm drain. First we note that Hunzinger was not a party to the lease agreement and cannot be found to have breached it.

¶31 Second, as to the landlord defendants who were parties to the lease, this claim is premised on the exact same conduct as the negligence claim—negligent acts of someone that failed to prevent the flooding—and it fails for the same reason. Because we have already concluded that Sears did not provided any evidence from which a genuine issue of material fact is created as to whether any particular defendant's acts caused the flooding, we also conclude that Sears failed to create a genuine issue of material fact as to whether the landlord defendants (or any other defendants) breached the lease agreement contract.

¶32 Sears belatedly switched its contract argument from the lease agreement to the construction contracts, arguing that its breach of contract claim against defendants was premised on "the construction contracts entered into … to construct the [parking garage][.]" Sears argues that as a third-party beneficiary to

that contract, it can maintain an action against defendants who were parties to the construction contract. However, Sears switched too late and without support. It is apparent from the complaint, which was never amended to include any additional claims based on the construction contracts, that Sears did not plead any other breach of contract claim than the one specifically citing its lease agreement. Accordingly, Sears' argument that its complaint encompasses a breach of a different contract to which it was a third-party beneficiary fails. That claim was not properly pled and cannot be the basis for avoiding summary judgment.

## II. The trial court's order denying attorneys' fees to defendants.

¶33 The second issue is whether the trial court properly denied defendants' claims for attorneys' fees as consequential damages for alleged breach of contract or under an exception to "the American rule."

¶34 Wisconsin follows the "American Rule." ***Kremers-Urban Co. v. American Emp'rs Ins. Co.***, 119 Wis. 2d 722, 744, 351 N.W.2d 156 (1984). Under this rule, "with the exception of those attorneys' fees incurred in third-party litigation caused by the party from whom the fees are sought, attorneys' fees may not be awarded unless authorized by statute or by a contract between the parties." ***Milwaukee Teacher's Educ. Ass'n v. Milwaukee Bd. of School Directors***, 147 Wis. 2d 791, 796-797, 433 N.W.2d 669 (Ct. App. 1988). "[W]e will not construe an obligation to pay attorneys' fees contrary to the American Rule unless the contract provision clearly and unambiguously so provides." ***Hunzinger Const. Co.***, 196 Wis. 2d at 340. "The interpretation of a contract is a question of law." ***Edwards v. Petrone***, 160 Wis. 2d 255, 258, 465 N.W.2d 847 (Ct. App. 1990). In construing a contract, "[w]e cannot ignore the draftsman's failure to use an obvious term, especially where it is the draftsman who is urging a tenuous

interpretation of a term in order to make it applicable to a situation that would clearly have been covered if the obvious term had been chosen." ***North Gate Corp. v. National Food Stores, Inc.***, 30 Wis. 2d 317, 323, 140 N.W.2d 744 (1966).

¶35 The defendants argue that in this case, the attorneys' fees award fits into the recognized exception to the American rule because it is authorized by contract, specifically, the 2006 settlement agreement between these parties, which includes a covenant not to sue and enforcement provisions. Those provisions state as follows:

> Covenant Not to Sue. The parties agree not to institute any action, proceeding or arbitration against any other party based upon any claims, obligations or liabilities released and discharged above.
>
> ….
>
> Enforcement. If any controversy arises with respect to the parties' rights or obligations under this Agreement, such rights or obligations shall be enforceable by injunction, by a decree of specific performance or by a suit for damages. Such remedies shall be cumulative and nonexclusive and shall be in addition to any other remedy to which the parties may be entitled.

¶36 Deciding whether the covenant to sue was breached here would require a determination of whether this suit was for conduct for which defendants had previously obtained a release. However, we need not decide that. Even assuming that the covenant not to sue was breached, the language of the enforcement provision on which the defendants rely cannot be construed, in light of the Wisconsin case law just cited, to obligate Sears to pay attorneys' fees because the provision in question does not "clearly and unambiguously so provide[]." ***Hunzinger Const. Co.***, 196 Wis. 2d at 340.

¶37 Resolution of this issue requires construction of the word "damages" in the covenant not to sue. The defendants argue that under rules of contract construction, this court should construe the term "damages" to include attorneys' fees in these circumstances because attorneys' fees fit the definition of ordinarily awardable contract damages under Wisconsin law, which holds that "the measure of contract damages in Wisconsin is the amount of the loss which arise[s] naturally, according to the usual course of things, from the wrong." *See* ***Mowry v. Badger State Mut. Cas. Co.***, 129 Wis. 2d 496, 536, 385 N.W.2d 171 (1986) (citation omitted). Defendants argue that attorneys' fees "arise[] naturally" from a breach of a covenant not to sue. Defendants cite to a federal case[8] for the proposition that litigants may recover attorneys' fees as consequential damages for breach of a covenant not to sue, but they acknowledge that no Wisconsin case has added consequential damages to the short list of exceptions to the American rule. However, it is quite apparent that Wisconsin law treats attorneys' fees as a special category of damages governed by a rule with two recognized exceptions. We cannot construe them to be consequential damages without running afoul of the holdings of ***Milwaukee Teacher's Education Association***, 147 Wis. 2d at 796-97, and ***Hunzinger***, 196 Wis. 2d at 340.

¶38 The defendants alternatively argue that this case presents an "entirely new issue" and this court should *create* an exception. They argue that the Supreme Court has "signaled" that we may create an exception to the American Rule where it is "warranted." For this proposition, they cite ***Community Care Organization of Milwaukee County, Inc. v. Evelyn O.***,

[8] ***Dallas Gas Partners, L.P. v. Prospect Energy Corp.***, 733 F.3d 148, 159 (5th Cir. 2013).

214 Wis. 2d 434, 571 N.W.2d 700 (Ct. App. 1997) and ***Stelpflug v. Town Board***, 2000 WI 81, ¶¶30-31, 236 Wis. 2d 275, 612 N.W.2d 700. In both cases, the court noted that the circumstances presented did not warrant an exception. In this case, the parties are sophisticated commercial parties well versed in litigation, familiar with drafting contracts and settlement documents. This case does not present the kind of circumstances where departure from a well established rule would be warranted.

## III. Hunzinger's motion for sanctions.

¶39 The trial court did not grant Hunzinger's motion for sanctions against Sears under the frivolous claims statutes.

¶40 We apply two different standards of review to allegations that a lawsuit is frivolous: one for determining whether actions are commenced frivolously and a second for determining whether actions are continued frivolously. ***Storms v. Action Wis., Inc.***, 2008 WI 56, ¶33, 309 Wis. 2d 704, 750 N.W.2d 739. Our review of the trial court's decision that an action was commenced frivolously is deferential. ***Id.***, ¶34. The trial court's discretionary decisions will be sustained so long as the trial court "'examined the relevant facts, applied a proper standard of law and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach.'" ***Id.*** However, where the trial court sets forth no reasons or inadequate reasons for its decision, we will independently review "the record to determine whether the circuit court properly exercised its discretion and whether the facts provide support for the court's decision." ***Connor v. Connor***, 2001 WI 49, ¶38, 243 Wis. 2d 279, 627 N.W.2d 182.

¶41 An attorney files a frivolous action when he or she fails to comply with WIS. STAT. § 802.05(2), which states:

> By presenting to the court, whether by signing, filing, submitting, or later advocating a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, all of the following:
>
> (a) The paper is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.
>
> (b) The claims, defenses, and other legal contentions stated in the paper are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.
>
> (c) The allegations and other factual contentions stated in the paper have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery….

¶42 The other of the so-called frivolous claims statutes is found at WIS. STAT. § 895.044, and it states:

> (1) A party or a party's attorney may be liable for costs and fees under this section for commencing, using, or continuing an action, special proceeding, counterclaim, defense, cross complaint, or appeal to which any of the following applies:
>
> (a) The action, special proceeding, counterclaim, defense, cross complaint, or appeal was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.
>
> (b) The party or the party's attorney knew, or should have known, that the action, special proceeding, counterclaim, defense, cross complaint, or appeal was *without any reasonable basis in law or equity* and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

> (2) Upon either party's motion made at any time during the proceeding or upon judgment, if a court finds, upon *clear and convincing evidence*, that sub. (1)(a) or (b) applies to an action or special proceeding commenced or continued by a plaintiff or a counterclaim, defense, or cross complaint commenced, used, or continued by a defendant, the court:
>
> (a) May, if the party served with the motion withdraws, or appropriately corrects, the action, special proceeding, counterclaim, defense, or cross complaint within 21 days after service of the motion, or within such other period as the court may prescribe, award to the party making the motion, as damages, the actual costs incurred by the party as a result of the action, special proceeding, counterclaim, defense, or cross complaint, including the actual reasonable attorney fees the party incurred, including fees incurred in any dispute over the application of this section. In determining whether to award, and the appropriate amount of, damages under this paragraph, the court shall take into consideration the timely withdrawal or correction made by the party served with the motion.

WIS. STAT. § 895.044.

¶43 The trial court's ruling on Hunzinger's motion for action costs for frivolous claims was one paragraph long.

> [N]ow is the only time I'm going to agree with [Sears' counsel]. But reluctantly I say you had a bare bones argument here to get your foot in the door but not much, but sufficient to bring it to the Court's attention. And certainly had joined some other ones here that you at least had some scintilla of possibilities of prevailing[,] which you did not.

¶44 When the trial court ruled on the defendants' claims for attorneys' fees as consequential damages and on Hunzinger's motion for sanctions, it referenced sanctions in passing but did not directly discuss the motion for actual costs under the frivolous claims statutes at all. In ruling that the negligence and contract claims created a "bare bones" complaint with a "scintilla of possibilities

of prevailing[,]" the trial court did not distinguish amongst the claims and the defendants.

¶45 Because the trial court did not set forth reasons for its decision for denying the frivolous claims sanctions, we independently review "the record to determine whether the circuit court properly exercised its discretion and whether the facts provide support for the court's decision." ***Connor***, 243 Wis. 2d 279, ¶38. We conclude that the record supports the award of sanctions to Hunzinger.

¶46 Hunzinger argues that it is entitled to sanctions under the statute for three reasons and points to the record to demonstrate Sears' admissions and refusals to withdraw claims. First, Hunzinger argues that Sears failed to make a reasonable inquiry into the facts before commencing the lawsuit. As noted above Sears' breach of contract claim was based entirely on the lease agreement. Hunzinger points out that Sears admitted in its interrogatory responses that Hunzinger was not a party to the lease agreement. Sears admitted that the only agreement Hunzinger was a party to was the settlement agreement which was not part of any of Sears' claims against Hunzinger. In its answers to Hunzinger's First Set of Request for Admission, Sears gave the following responses:

> 1. Admit that other than the Settlement Agreement, there is no contractual relationship between Sears and Hunzinger that is in any way related to the Project.
>
> ANSWER: Admit.
>
> 2. Admit that there is no "lease agreement" between Hunzinger and Sears, as alleged in paragraph 34 of Sears' Complaint.
>
> ANSWER: Admit.
>
> 3. Admit that Hunzinger did not breach any "applicable lease agreement provisions" as alleged in paragraph 34 of Sears' Complaint.

ANSWER: Admit.

¶47 Second, Hunzinger argues that Sears failed to make a reasonable inquiry into the law and brought (and refused to withdraw) a breach of contract claim against Hunzinger notwithstanding the fact that no contract other than the settlement agreement existed between the two parties. Instead, in response to Hunzinger's summary judgment motion on that claim, Sears responded with the argument—for the first time in the litigation—that its breach of contract claim concerned a *different* contract altogether ("the contracts entered into were to build the East Parking Garage—a structure intended to benefit, in part, businesses located in the Bayshore Mall") and pointed out the proximity of the parking garage to Sears' store. We reject any reliance on the construction contract above due to Sears failure to timely allege it. Hunzinger also argues that Sears failed to present any legal basis for its specific claim of negligence against Hunzinger or to support it with expert opinion as required by law. Hunzinger points to the expert's expressed lack of any opinion as to Hunzinger's specific conduct.

¶48 We conclude that there is clear and convincing evidence on this record that the action against Hunzinger was "without any reasonable basis in law or equity," and that it is proper to award Hunzinger actual costs under WIS. STAT. § 895.044. We therefore remand on this issue for the trial court to determine the reasonableness and amount of the sanction. *See* WIS. STAT. § 895.044(5).

¶49 We note that Hunzinger also seeks to have its actual costs on appeal included in the sanction award. In its appellate brief, Hunzinger states, "[U]nder the circumstances, Sears and its counsel should be sanctioned and bear the costs that Hunzinger has incurred at the trial court level and in this appeal." Hunzinger cites to ***Riley v. Isaacson***, 156 Wis. 2d 249, 261, 456 N.W.2d 619 (Ct. App. 1990),

and it describes the case as one in which the court of appeals awarded the party prevailing on appeal of a frivolous claim its appellate attorneys' fees pursuant to WIS. STAT. § 802.05.

¶50 The reasons for the award in ***Riley***, however, are not present here. That case stands for a related but inapplicable proposition: "[W]e hold that a party *prevailing in the defense of an award of fees under* sec. 802.05 is also entitled to a further award on appeal without a finding that the appeal itself is frivolous under [WIS. STAT. §] 809.25(3)." ***Riley***, 156 Wis. 2d at 263 (emphasis added). In ***Riley*** the court was explicit that its reasoning was focused on the situation where a party was defending an award, quoting favorably a federal case that stated, "Those to whom sanctions have been awarded should be induced to defend their awards, without additional costs to themselves." ***Id.*** at 262 (quoting ***Mars Steel Corp. v. Continental Bank N.A.***, 880 F.2d 928, 939 (7th Cir. 1989).

¶51 ***Riley*** further reasoned that the Wisconsin legislature "has expressed its intent that [WIS. STAT. RULE] 802.05 track federal Rule 11." ***Id.*** at 261. It cited a 1987 legislative revision to the statute that was expressly undertaken "to conform with changes in the federal rules." ***Id.*** at 263. The statute had initially been created by our supreme court under its rule-making authority, and it has directly endorsed the parallel interpretation of § 802.05 with Rule 11. In 2005, when our supreme court, again pursuant to its rule-making authority, recreated § 802.05 by adopting the version of Rule 11 as it had most recently been revised in 1993, it stated, "Judges and practitioners will now be able to look to applicable decisions of federal courts since 1993 for guidance in the interpretation and application of the mandates of [Rule] 11 in Wisconsin." Supreme Court Note, 2005, WIS. STAT. RULE 802.05. Shortly after ***Riley*** was decided, the question ***Riley*** addressed—whether appellate attorneys' fees are awardable under Rule 11

to a party based on the fact that the appeal is defending an award of sanctions based on a frivolous filing at the trial court (and where the appeal itself is not frivolous)—was answered in the negative by the United States Supreme Court in ***Cooter & Gell v. Hartmarx Corp.***, 496 U.S. 384, 405-07 (1990) (holding that expenses incurred on appeal can be shifted onto appellants "only when those expenses are caused by a frivolous appeal, and not merely because a Rule 11 sanction upheld on appeal can ultimately be traced to a baseless filing in district court"). ***Cooter & Gell*** resolved a circuit split on this issue. ***Id.*** at 406. Because ***Riley***'s holding was too narrow to require awarding appellate attorneys' fees on these facts and because we do not find any guidance in federal law to the contrary, we decline Hunzinger's request to include its appellate attorneys' fees in the § 802.05 sanction.

¶52 We reverse that part of the order denying Hunzinger's sanctions motion and remand for a determination of the amount of the sanction.

*By the Court.*—Order affirmed in part; reversed in part and cause remanded with directions.

Not recommended for publication in the official reporters.