should be remanded to the Workers' Compensation Court for further proceedings consistent with this opinion—and, perhaps, greater clarity from the parties about how Mueller's actual take-home pay is calculated. Any issues with respect to possible overpayment should be addressed by the trial court. And because it is not clear whether the trial court would have adopted the opinion of the court-appointed vocational rehabilitation counselor had it not disagreed with her assumptions regarding Mueller's average weekly wage, the court should reconsider that issue in the first instance.

CONCLUSION

For the foregoing reasons, the judgment of the review panel of the Workers' Compensation Court is reversed, and the cause is remanded with directions to remand the case to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

MCKINNIS ROOFING AND SHEET METAL, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. JEFFREY D. HICKS, APPELLEE AND CROSS-APPELLANT.

___ N.W.2d ___

Filed August 5, 2011. No. S-10-1048.

1. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
2. **Contracts.** When there is a question about the meaning of a contract's language, the contract will be construed against the party preparing it.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded with directions.

David V. Drew, of Drew Law Firm, for appellant.

Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MILLER-LERMAN, J.

NATURE OF CASE

McKinnis Roofing and Sheet Metal, Inc. (McKinnis), and homeowner Jeffrey D. Hicks entered into two contracts. The first contract related to Hicks' roof, and the second contract related to copper awnings on Hicks' residence.

McKinnis filed a complaint in the district court for Douglas County alleging that Hicks breached both contracts. After trial, the district court filed an order of judgment on October 1, 2010, in which it determined that Hicks had breached both contracts. With regard to the roofing contract, the court awarded McKinnis damages in the amount of $4,419.88. With regard to the awning contract, the district court awarded McKinnis damages in the amount of $789.80.

McKinnis appeals, claiming that the district court erred in calculating the amount of damages to which it was entitled. Hicks cross-appeals and claims, inter alia, that the district court erred when it determined that he breached the contracts. As explained below, based on the facts and contract language, we determine that Hicks did not breach either contract. Accordingly, we reverse the order and remand the cause to the district court with directions to enter judgment in favor of Hicks.

STATEMENT OF FACTS

Hicks' home was damaged in a hailstorm in June 2008. The storm caused damage to Hicks' wood shake roof and copper awnings. McKinnis and Hicks entered into a written contract presented by McKinnis on July 10 regarding the roof. The contract provided that McKinnis would replace or repair the roof upon approval and payment from Hicks' insurance company, Chubb Group of Insurance Companies (Chubb). Paragraph 7 of the roofing contract also provided that acceptance under the agreement "cannot be withdrawn after McKinnis . . . personnel appear on site ready to perform except by mutual written agreement of the parties."

The record is replete with evidence, not necessary to repeat here, regarding the efforts required to obtain the insurance payment. Chubb agreed to pay for the roof repair and issued a payment to Hicks in the amount of $74,913.23. Hicks notified McKinnis that he was going to replace the roof with a slate roof using a different contractor. McKinnis sued Hicks for lost profits for losing the wood shake roof replacement job.

On September 16, 2008, the parties agreed that McKinnis would replace Hicks' copper awnings damaged in the storm. Paragraph 15 of the awning contract provided that Hicks would pay McKinnis the cost of material and labor for job setup "when the same are delivered to the job site" and that the balance would be due upon completion. Despite the ongoing litigation, McKinnis informed Hicks through its attorney that it still intended to perform its obligation under the awning contract. However, because of the pending issues involving the roof contract and despite the language of the awning contract, McKinnis demanded payment on the awning contract before it would perform. Hicks declined McKinnis' proposal for advance payment and repeatedly indicated his readiness to adhere to the awning contract. McKinnis did not go forward with the awning contract and sued Hicks for loss of profits for the copper awning job based generally on a theory that Hicks' refusal of its demand for advance payment was a breach by Hicks.

The district court conducted a trial and filed its order on October 1, 2010, in which it determined that Hicks had breached both contracts and owed McKinnis damages. The district court generally determined that McKinnis had satisfied the conditions of the roof contract and that, in reliance on Restatement (Second) of Contracts § 251 (1981), McKinnis was justified in seeking "assurance of performance" by requesting advance payment before performing under the awning contract. The court awarded McKinnis $4,419.88 on the roof contract and $789.80 on the awning contract. McKinnis appeals, and Hicks cross-appeals.

ASSIGNMENTS OF ERROR

In its appeal, McKinnis generally claims that the district court awarded insufficient damages and specifically erred

when it calculated damages due to the breach of the contracts based on McKinnis' net profit margin rather than its gross profit margin.

In his cross-appeal, Hicks claims, summarized and restated, that the district court erred when it determined that Hicks had breached both contracts.

STANDARD OF REVIEW

[1] The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

ANALYSIS

McKinnis' Appeal: Because There Is Merit to the Cross-Appeal, We Need Not Consider the Correctness of the Damage Awards.

McKinnis claims that the damage awards entered by the district court were insufficient as to each of the contracts. In this regard, McKinnis urges this court to adopt a theory of contract damages which would, in certain cases, permit the award of damages based on a gross lost profit margin rather than a net lost profit margin. Without regard to the desirability of endorsing such a damage formulation, and despite the scholarship exhibited in the briefs related thereto, because we determine that Hicks did not breach either the roof contract or the awning contract, we do not consider McKinnis' assignment of error related to the proper measure of damages.

Hicks' Cross-Appeal: Hicks Did Not Breach the Roof Contract.

Hicks claims that because he properly withdrew his acceptance of the roof contract in accordance with paragraph 7, he did not breach the contract, and that the district court erred when it determined that he had breached the roof contract. We find merit to Hicks' cross-appeal and determine that the district court erred when it determined that Hicks breached the roof contract.

The parties and the district court devote considerable attention to the relative efforts of the parties to obtain the insurance

settlement check. In any event, there is agreement that Chubb sent the check, and we determine the means by which this was achieved was not a breach of the contract and is not determinative of the outcome of this appeal regarding the roof contract.

Although we recognize that the district court stated generally that Hicks did nothing to rescind or cancel the roof contract, elsewhere, it specifically found in its order that "[f]ollowing receipt of the insurance settlement from Chubb, [Hicks] informed [McKinnis] that [Hicks] was having his roof replaced with a slate roof, by another contractor." The court found that "[McKinnis] then sued [Hicks]."

In his answer, Hicks alleged in the sixth affirmative defense that he "withdrew any alleged acceptance prior to any McKinnis . . . personnel appearing on site ready to perform." At trial, Hicks testified that he terminated the agreement, inter alia, because under the roof contract, he was allowed to withdraw his acceptance. At trial, a representative of McKinnis testified essentially that McKinnis "never had a crew of construction personnel show up at the Hicks [residence] to do any of the replacement tasks because [McKinnis] never even bought any of those raw materials."

Notwithstanding its specific finding that Hicks informed McKinnis that he was going to engage another contractor to replace the roof, the district court failed to analyze the significance of this fact in the context of the rights and obligations of the parties under the roof contract. In this regard, Hicks draws our attention to paragraph 7 of the roof contract which provides that the agreement "cannot be withdrawn after McKinnis . . . personnel appear on site ready to perform except by mutual written agreement of the parties."

In its appellate brief, McKinnis does not meaningfully suggest that its personnel appeared on the site ready to replace the roof, but instead asserts that "McKinnis personnel came to the Hicks residence several times to take pictures documenting the hail damage to be presented to the insurance carrier [and] this appearance at the Hicks residence by McKinnis personnel eliminated Hicks' right to withdraw his acceptance of the contract." Reply brief for appellant at 13. We disagree with

McKinnis regarding the significance of these facts under the terms of the roof contract.

[2] The roof contract was presented by McKinnis to Hicks. When there is a question about the meaning of a contract's language, the contract will be construed against the party preparing it. *Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008). The plain language of paragraph 7 permits Hicks to withdraw and terminate the roof contract before McKinnis' personnel appear on the site ready to perform the work of replacing the roof. We do not accept McKinnis' reading of the roof contract equating inspection of the roof and photographing roof damage for insurance purposes as an appearance "on site ready to perform" roof replacement work as provided for in paragraph 7.

The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below. *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010). Upon our review on appeal, we conclude that the district court erred when it failed to accord legal significance under the controlling contract to its finding that Hicks decided to use another contractor at a point in time prior to McKinnis' appearance to perform the replacement work. Hicks' decision had the legal effect of withdrawing from the roof contract, as he was permitted to do under paragraph 7. Hicks' withdrawal was not a breach of the roof contract. The district court erred when it found that Hicks breached the roof contract.

Hicks' Cross-Appeal: Hicks Did Not Breach the Awning Contract.

Hicks claims that the district court erred when it determined that he breached the awning contract. We find merit to this assignment of error.

The parties entered into the awning contract in September 2008. Paragraph 15 of the awning contract provides that Hicks would pay McKinnis the cost of material and labor for job setup "when the same are delivered to the job site" and that the balance would be due upon completion. Reference

is made in the record to a letter dated February 10, 2009, in which Hicks informed McKinnis that he was ready to perform his obligations under the awning contract. McKinnis filed its complaint on March 5, in which it alleged that the parties had entered into the awning contract on September 16, 2008, that McKinnis had performed conditions precedent, and that Hicks had breached the awning contract by refusing to permit McKinnis to perform replacement of the copper awnings on Hicks' residence.

In a letter dated April 1, 2009, Hicks referred to his February 10 letter and again expressed his willingness to adhere to the awning contract. In his answer filed April 2, Hicks denied McKinnis' allegations "because [McKinnis] has not performed, at all . . . despite . . . Hicks' requests for [McKinnis] to perform under this [awning] contract." In his third affirmative defense, Hicks alleged that McKinnis had "materially breached the contracts between the parties." In McKinnis' answer to request for admissions, it admitted that as of April 2, it had not replaced the copper awnings.

On April 9, 2009, McKinnis demanded prepayment of the cost of the awning contract "prior to performance." On April 22, Hicks declined McKinnis' demand to prepay but repeated his willingness to abide by the awning contract.

In the district court's order, it found that Hicks had "made [his] demand on [McKinnis] to perform on the [awning] contract in February and April, 2009, and [McKinnis] would have presumably accomplished the copper awnings job in 2009." Although the district court found that Hicks stood ready to abide by the contract, the district court nevertheless found that

> under the circumstances, [McKinnis] was justified in demanding [on April 9, 2009,] assurance of performance from [Hicks]. . . . See Section 251 of Second Restatement of Contracts. When [Hicks] refused to pay the entire contract price prior to [McKinnis'] performance, [McKinnis] was justified in treating the refusal as [Hicks'] breach . . . .

Restatement (Second) of Contracts § 251 at 276-77 (1981), upon which the district court relied, provides:

> When a Failure to Give Assurance May Be Treated as a Repudiation
>
> (1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
>
> (2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

The district court did not specifically explain "the circumstances" upon which it relied as a basis for invoking § 251 and endorsing McKinnis' demand for prepayment, the refusal of which it deemed a breach by Hicks. McKinnis asserts that its demand for prepayment was based primarily on Hicks' having breached the roof contract.

We need not consider the wisdom of adopting § 251 of the Restatement or whether, if adopted, it would apply to the facts of this case. The basis on which McKinnis and the district court evidently believed that McKinnis' demand for assurance was appropriate was the presumed meritoriousness of McKinnis' claim that Hicks had already breached the roof contract and was therefore inclined to also breach the awning contract. As we have already determined in this opinion, the foundation for these beliefs was erroneous.

The basis for McKinnis' belief that Hicks would commit a breach of the awning contract was nullified by Hicks' assurances of performance both before and after McKinnis filed the lawsuit. As the district court's finding that Hicks demanded that McKinnis perform makes clear, Hicks did not repudiate the awning contract. See *Anderson Excavating v. SID No. 177*, 265 Neb. 61, 654 N.W.2d 376 (2002) (stating that repudiation is question of fact). Further, we have determined that Hicks did not breach the roof contract; thus, even if we were to adopt § 251 of the Restatement, the belief by McKinnis and the court

that one breach foreshadows another and serves as a basis for McKinnis to demand assurance and avoid its duty under the awning contract was not reasonable. Hicks has not breached the roof contract or repudiated the awning contract. The prepayment by McKinnis was not warranted, and Hicks' refusal of the demand was not a breach of the awning contract.

The district court's findings show that Hicks stood ready to perform his obligations under the awning contract and that, inter alia, in the absence of a breach of the roof contract by Hicks, McKinnis was not justified in seeking prepayment contrary to the payment terms and schedule in paragraph 15 of the awning contract. Hicks' refusal to prepay for the awning job was not a breach by Hicks.

The district court erred when it determined that Hicks breached the awning contract.

CONCLUSION

Hicks did not breach the roof contract or the awning contract. We therefore reverse the order of the district court and remand the cause with directions to vacate the judgment entered on McKinnis' behalf and to enter judgment in favor of Hicks.

REVERSED AND REMANDED WITH DIRECTIONS.