COURT OF APPEALS DECISION DATED AND FILED

October 1, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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* § 808.10 and RULE 809.62, STATS.

No. 98-1714-FT

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

WIEDERHOLT EXCAVATING & TRENCH,

PLAINTIFF-RESPONDENT,

V.

WILLIAM PROBST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed.*

DYKMAN, P.J. William Probst appeals from a small claims judgment in favor of Wiederholt Excavating and Trenching.[1] The judgment was for the balance due on a contract to install a sewer ($1,526), plus pre-judgment interest and costs ($1,534.40), for a total of $3,060.40. Probst asserts that

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[1] This appeal is decided by one judge pursuant to § 752.31(a), STATS, and expedited under RULE 809.17, STATS.

Wiederholt negligently breached the contract, causing him damages of $1,440, for which he filed a counterclaim. Because negligence was not pleaded, proven or argued in the trial court, we will not address this assertion. We therefore affirm.

Probst contracted with Wiederholt to install a sewer for a condominium project that Probst was developing. The contract, in the amount of $52,694, was based upon a set of preliminary plans, and the contract provided: "complete as per plan." After this, but before the project began, Probst delivered a set of plans to Wiederholt which had been approved by the State of Wisconsin. Neither Probst nor Wiederholt was aware that the preliminary plans had been changed, presumably by an engineer, and that the approved plans required the sewer to be buried deeper.

Wiederholt began work using the preliminary plans. After some of the sewer trench had been dug and the sewer buried, the depth problem was discovered. Wiederholt gave Probst a proposal which contemplated re-laying the sewer main at $6 per foot, installing a lateral at $7.50 per foot, and removing and lowering the manhole for $350. Although Probst did not sign the proposal, the parties do not dispute that he agreed to it. The cost for the three items was $5,342, and Wiederholt testified that he sent a bill to Probst for that amount. Probst denied getting the bill, but he paid Wiederholt that amount, holding back $1,526, which apparently was for seeding or re-seeding the area above the sewer.[2]

Wiederholt eventually sued Probst to recover the $1,526. Probst filed a counterclaim, against Wiederholt for $1,440. His counterclaim read: "This

[2] We cannot determine the exact claim because, although Probst had an exhibit marked that explained his counterclaim, he withdrew the exhibit before it was admitted.

demand is based upon the Plaintiff's failure, while providing goods and services to the Defendant, to restore the property to its original condition as required, said failure resulting in costs to the Defendant of $1,440."

The trial court concluded that because the original contract between the parties said nothing about restoring the property to its original condition, Wiederholt was not obliged to do so, and his failure to do so was not a breach of the contract. The trial court therefore dismissed Probst's counterclaim and granted judgment to Wiederholt.

Probst first argues that Wiederholt could not recover as a matter of law because Wiederholt failed to perform the work in compliance with the contract. He focuses on the phrase requiring the work to be performed "as per plan." He asserts that there is an implied requirement that Wiederholt use the revised plans, and that Wiederholt started the project by using the "wrong" plans.

Probst cites no authority that when a contract is bid using preliminary plans, the contractor must perform the work specified by amended or final plans, regardless of changes required by the amended document. We have said that appellate arguments unsupported by authority are inadequate, and that we will not consider them. ***State v. Shaffer,*** 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). We will follow ***Shaffer***'s admonition, and not consider Probst's unsupported theory. But we note that the rule concerning contract modifications appears to be otherwise. In ***Lamb v. Manning***, 145 Wis.2d 619, 627, 427 N.W.2d 437, 41 (Ct. App. 1988), we noted that: "a party to a contract cannot unilaterally modify its terms without the other party's assent." ***Id.*** (quoting ***Schaefer v. Dudarenke***, 89 Wis.2d 483, 492, 278 N.W.2d 844, 848 (1979). If Probst was correct in his theory, Wiederholt would have been contractually bound

to follow the amended or final plans no matter what changes had been made. We doubt that had Probst briefed the question, such an assertion would have been supported by authority.

Next, Probst argues that the trial court erroneously exercised its discretion by preventing Probst from presenting testimony that Wiederholt was required by building code to construct the sewer according to the final or "state approved" plans. Usually, evidentiary determinations are discretionary, and we will not reverse absent an erroneous exercise of discretion. ***Broadhead v. State Farm Mut. Auto. Ins. Co.***, 217 Wis.2d 231, 239, 579 N.W.2d 761, 766 (Ct. App. 1998). However, § 911.01(4)(d), STATS., provides that the rules of evidence found in Chapters 901 to 911, STATS., are inapplicable in small claims actions, with exceptions not relevant here.[3]

The erroneous exercise of discretion that Probst asserts is the sustaining of a hearsay objection when Probst attempted to quote a state and local building inspector. The inspector allegedly told him: "the contractor shall not commence work without an approved set of plans; to do so is at his own risk,

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[3] Section 799.209(2), STATS., is in effect a small claims code of evidence. That section reads:

> The proceedings shall not be governed by the common law or statutory rules of evidence except those relating to privileges under ch. 905 or to admissibility under s. 901.05. The court or court commissioner shall admit all other evidence having reasonable probative value, but may exclude irrelevant or repetitious evidence or arguments. An essential finding of fact may not be based solely on a declarant's oral hearsay statement unless it would be admissible under the rules of evidence.

The trial court's exclusion of the building inspector's hearsay statement might be sustained under this statute, but Wiederholt does not make that argument. We therefore consider it no further.

incurring all resulting costs." We agree with Probst that the trial court erred by sustaining a hearsay objection to this evidence. The rule against hearsay, codified in Ch. 908, STATS., is inapplicable in small claims proceedings. Section 911.01(4)(d), STATS. But the error is harmless. Section 805.18(1), STATS., provides that we are to disregard all errors at trial that do not affect the substantial rights of a party.

The evidence of the building inspector's opinion is in part an opinion about WIS. ADM. CODE § COMM. 82.20(6). That section reads:

> The plumber responsible for the installation of the plumbing shall keep at the construction site at least one set of plans bearing the department's or the agent municipality's stamp of approval and at least one copy of specifications. The plans and specifications shall be open to inspection by an authorized representative of the department.

Interpretation of an administrative rule, like the interpretation of a statute, is a question of law that we review *de novo*. ***Brown v. Brown***, 177 Wis.2d 512, 516, 503 N.W.2d 280, 281 (Ct. App. 1993). The code section Probst relies upon requires that a plumber keep a set of approved plans at the construction site. Probst did not introduce evidence that Wiederholt failed to keep the approved plans at the construction site. The problem in this case was not caused by the location of the approved plans, but by the fact that neither Probst nor Wiederholt knew that the approved plans varied from the preliminary plans.

Insofar as the building inspector's opinion was that a plumber's failure to keep approved plans at a building site makes the plumber liable for costs resulting from that failure, that opinion is also one of law, which we review *de novo*. ***State v. Janssen***, 219 Wis.2d 362, 370, 580 N.W.2d 260, 263 (1998). We

do so and conclude that Probst failed to show that Wiederholt failed to prove that there were any "resulting costs" caused by the alleged, but not proven, failure to keep a set of approved plans at the construction site.

Because we have concluded that the trial court's error was harmless, we need not address Probst's assertion that the trial court was *sua sponte* required to take judicial notice of applicable building codes and mention those codes in his opinion. We note again, however, that § 911.01(4)(d), STATS., makes rules of evidence found in Chapters 901 to 911 inapplicable in small claims actions. The statute requiring courts to take judicial notice of ordinances and rules is § 902.03(1)(a), STATS., which also is not applicable to small claims actions.

Probst's last contention is that the trial court erred by denying his counterclaim. The trial court concluded that since the contract did not require Wiederholt to return the site to its original condition, his failure to do so was not a breach of the contract. On appeal, Probst asserts that "In fact, Mr. Probst testified that as a result of Wiederholt's negligence in performing the contract in a mistaken fashion, that the land was left in disrepair, and he had to incur additional expenses for yard repair work and re-seeding of the property." But the record citations Probst provides in his brief do not suggest that he is making a claim in negligence, nor does his counterclaim make any mention of negligence. Indeed, the counterclaim speaks of a "failure to restore the property to its original condition, *as required*." (Emphasis added.) We do not fault the trial court for interpreting this to mean "as required by contract" rather than "as required under common law negligence principles." Probst did not assist the trial court by explaining that his claim was not in contract but in negligence. He provided no evidence as to the duty of a contractor under the circumstances of this case. We are not convinced by the fact that Probst was *pro se* at trial. He is represented on appeal and now

asserts negligence in performing a contract; however, he fails to consider or distinguish the rule that Wisconsin does not recognize as a separate tort the negligent breach of a contract. ***Landwehr v. Citizens Trust Co.***, 110 Wis.2d 716, 723, 329 N.W.2d 411, 414 (1983). He makes no mention of the public policy factors which must be considered. ***Schlomer v. Perina***, 169 Wis.2d 247, 252-53, 485 N.W.2d 399, 401-02 (1992). If Probst was attempting to assert a negligence claim in the trial court, he did not alert the trial court to that theory, nor did he introduce evidence necessary to a negligence claim. Matters not raised in the trial court will not be reviewed on appeal. ***Vollmer v. Luety***, 156 Wis.2d 1, 10, 456 N.W.2d 797, 801-02 (1990). We therefore do not consider whether the trial court erred by not *sua sponte* considering a theory never presented to it.[4]

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports. *See* RULE 809.23(1)(b)4, STATS.

[4] We recognize that small claims court is intended to be informal, and that many small claims litigants appear *pro se*. This places an additional burden on a trial court to determine the law applicable to a claim. We do not believe, however, that a small claims judge must attempt to prove up a plaintiff's claim in a manner not readily apparent from the material presented by the parties. To make matters worse, Wiederholt claimed that he had seeded city property, and that Probst's property was torn up everywhere. Without testimony as to the duty of a contractor to seed or re-seed trench areas in the absence of a contract to do so, and under the facts of this case, we cannot fault the trial court for not attempting to discover a possible negligence theory of recovery.