COURT OF APPEALS
DECISION
DATED AND FILED

April 19, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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 Nos. 2011AP228, 2011AP1110 **Cir. Ct. No. 2002CV2655**

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

NO. 2011AP228

KENNETH F. SULLIVAN CO.,

PLAINTIFF,

V.

PHILLIP MCMANAMY, ARCHITECTURAL METAL, LLC,
SOUTHERN WISCONSIN ROOFING CO., INC.,
PHOENIX GLASS (1992), INC., SCHULTZ ELECTRIC, INC.
AND CINCINNATI INSURANCE COMPANY,

DEFENDANTS,

STATZ & HARROP, INC. AND
CHRISTOPHER BOZYK ARCHITECTS LTD.,

DEFENDANTS-RESPONDENTS,

V.

KENNETH S. KERYLUK AND MELISSA E. WEE,

DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,

V.

MEAD & HUNT, INC., MONONA PLUMBING & FIRE PROTECTION, INC., SCHULTZ ELECTRIC, INC., VALLEY FORGE INSURANCE COMPANY, ACUITY, ROBERT E. RILEY, THOMAS A. KNOOP, GENERAL CASUALTY COMPANY OF WISCONSIN, REGENT INSURANCE COMPANY, LEXINGTON INSURANCE COMPANY AND COLD STONE GRANITE COMPANY D/B/A ARTISTIC STONE,

THIRD-PARTY DEFENDANTS.

NO. 2011AP1110

KENNETH F. SULLIVAN CO.,

PLAINTIFF-RESPONDENT,

V.

PHILLIP MCMANAMY, ARCHITECTURAL METAL, LLC, SOUTHERN WISCONSIN ROOFING CO., INC., SCHULTZ ELECTRIC, INC., CINCINNATI INSURANCE COMPANY AND CHRISTOPHER BOZYK ARCHITECTS LTD.,

DEFENDANTS,

STATZ & HARROP, INC. AND PHOENIX GLASS (1992), INC.,

DEFENDANTS-RESPONDENTS,

V.

KENNETH S. KERYLUK AND MELISSA E. WEE,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

MEAD & HUNT, INC., LEXINGTON INSURANCE COMPANY, GENERAL CASUALTY COMPANY OF WISCONSIN AND REGENT INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS-RESPONDENTS,

MONONA PLUMBING & FIRE PROTECTION, INC., SCHULTZ ELECTRIC, INC., VALLEY FORGE INSURANCE COMPANY, ACUITY, ROBERT E. RILEY, THOMAS A. KNOOP AND COLD STONE GRANITE COMPANY D/B/A ARTISTIC STONE,

THIRD-PARTY DEFENDANTS.

APPEALS from judgments and orders of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed*.

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 LUNDSTEN, P.J. These consolidated appeals concern a complex lawsuit with multiple claims and counterclaims stemming from the construction of a large single-family dwelling. The original general contractor for the project, Kenneth F. Sullivan Co., walked away when the job was approximately 85% complete. The primary issue in these appeals relates to a breach of contract claim brought by the homeowners, Kenneth Keryluk and Melissa Wee (hereafter K&W), against Sullivan. That claim alleged defective work on the part of Sullivan and subcontractors under Sullivan's supervision, and also alleged that Sullivan breached the contract when Sullivan walked off the job. Complicating matters, K&W and Sullivan later entered into a settlement agreement. Among other things, that settlement agreement purported to assign Sullivan's potential contribution and indemnity claims against subcontractors to K&W.

¶2 Prior to and just after the start of trial, the circuit court dismissed all parties adverse to K&W, thereby ending the case. On appeal, K&W argue that the circuit court erred in multiple ways, but the core dispute is whether the circuit court erred when it deemed evidence inadmissible, leaving K&W with insufficient remaining evidence to support their claims. We address and reject K&W's arguments on this topic and their additional arguments relating to the dismissal of their false lien, malicious prosecution, and bad faith claims. We affirm the circuit court.

Background

¶3 In June 2001, K&W entered into a construction contract with Sullivan for the construction of a large, custom single-family residence in Verona, Wisconsin. Consistent with being the general contractor, Sullivan agreed to perform some of the work and to coordinate and supervise subcontractors.

¶4 Construction began in 2001. Approximately ten months later, on April 18, 2002, Sullivan quit the job because of a billing dispute with K&W. After that date, Sullivan ceased acting as the general contractor or performing in any other respect under the contract. When Sullivan walked off the job, construction was about 80 to 85% complete. K&W persuaded the subcontractors[1] to continue working on the house and, thereafter, K&W paid them directly. In an affidavit submitted to the circuit court, Melissa Wee stated that, from that point forward, "[m]y husband and I began performing the services of the general contractor."

[1] For ease of discussion, we follow K&W's lead and refer to all of the parties that provided services or products, except for Sullivan, as "the subcontractors."

¶5 This lawsuit began in August 2002, when Sullivan sued K&W seeking to recover amounts allegedly due to Sullivan for work performed prior to Sullivan walking off the job. Eventually, the lawsuit involved several subcontractors, Sullivan's insurers, and additional claims and counterclaims. A breach counterclaim brought by K&W against Sullivan is the primary focus in this appeal. K&W alleged that Sullivan breached the contract in several ways, including providing flawed work, inadequately supervising the work of subcontractors, and abandoning the project prior to completion. Other claims by K&W included false lien and malicious prosecution claims against Sullivan and bad faith claims against Sullivan's insurers, General Casualty and Regent Insurance. K&W's fourth amended counterclaim and third party complaint, in total, listed twenty causes of action. For reasons that will become apparent, it is significant that Sullivan amended its original complaint to add claims for contribution and indemnification against various subcontractors in the event that Sullivan was found liable to K&W.

¶6 After years of pretrial litigation, after several parties had been dismissed from the case, and after various rulings dismissing or limiting some of K&W's claims, K&W and Sullivan entered into a partial settlement agreement in August 2010. Pursuant to the agreement, all of Sullivan's claims against K&W were dismissed and Sullivan was dismissed as a party. The agreement also assigned to K&W the "rights to any insurance proceeds" from Sullivan's insurers and Sullivan's rights to seek indemnity, subrogation, or contribution from subcontractors. K&W agreed that Sullivan would not have to pay any damages but, rather, K&W's recovery would depend on proving a breach and then collecting damages via: (1) "insurance proceeds that [Sullivan] is entitled to

receive" and (2) "recoveries [K&W] may make from any party who may be liable to Sullivan for contribution/indemnification."

¶7 At this point, six parties adverse to K&W remained in the case: four subcontractors (Christopher Bozyk Architects, Mead & Hunt, Phoenix Glass, and Statz & Harrop) and Sullivan's insurers (General Casualty and Regent).[2] These remaining parties brought various motions, both written and oral, leading up to trial and in the early stages of the trial. Based on those motions and the related hearings, the circuit court dismissed or granted directed verdicts to all of the remaining adverse parties, ultimately concluding that, in light of other evidentiary rulings, K&W lacked sufficient expert testimony on damages necessary to support their claims. K&W appeal from the resulting orders and judgments.[3]

Discussion

¶8 Our discussion of K&W's appeals is split into two main parts. First, we address K&W's arguments relating to Sullivan's alleged breach of contract. Second, we address K&W's arguments about their false lien, malicious prosecution, and bad faith claims.

[2] These parties have all filed responsive briefs in these appeals. We are told that another subcontractor, Monona Plumbing, remained in the case, but that K&W settled with it, and Monona Plumbing is not involved in these appeals. Mead & Hunt's insurer, Lexington Insurance, also remained in the case. The parties suggest no reason why we need to discuss Lexington separately from Mead & Hunt.

[3] The circuit court at times speaks of dismissing a particular party and at other times, as in the case of Sullivan's insurers, speaks in terms of directing a verdict. For ease of discussion, we generally refer to all of the court's rulings and orders as having "dismissed" the parties adverse to K&W. No one suggests that this label makes a difference.

I. Arguments Related To Breach Of Contract

A. Effect Of Settlement Agreement Between K&W And Sullivan On The Trial

¶9 The circuit court dismissed the parties adverse to K&W based on the court's assessment that K&W could not prove at trial what they needed to prove. Thus, our discussion must begin with a general description of what K&W needed to prove with respect to each adverse party. More specifically, we need to describe how the pretrial settlement agreement between K&W and Sullivan altered the burden K&W would have borne had the trial proceeded.

¶10 Turning first to the subcontractors, K&W tell us that their settlement agreement with Sullivan resulted in Sullivan's dismissal from the suit and the assignment to K&W of any claims Sullivan may have had for contribution and indemnity from the subcontractors. So far as we can tell from the agreement, related portions of the record, and apparent assumptions underlying the parties' arguments on appeal, the practical effect of the settlement agreement was that K&W became plaintiffs with respect to the subcontractors.[4] That is, K&W took on the burden of apportioning blame and the corresponding damages for specific defective work between Sullivan and each subcontractor. It follows that, at trial, K&W would have needed to provide proof distinguishing between, on the one hand, Sullivan's liability and corresponding damages for Sullivan's own work and, on the other, each subcontractor's liability and corresponding damages. Only then could K&W, standing in Sullivan's shoes, establish what was owed to K&W via

[4] When the circuit court agreed that it would "exclude Sullivan as a party from the proceedings" pursuant to the settlement agreement, the court commented that K&W took the position that they would "be in the posture of a plaintiff to go first at trial." K&W's attorneys did not dispute this characterization.

contribution or indemnity from each subcontractor that remained a party in the case.

¶11 As to Sullivan's insurers, the settlement agreement also assigned to K&W the rights to insurance proceeds from Sullivan's insurers. Thus, in order to benefit from this assignment, it appears that K&W would have needed to establish damages that met two criteria. First, the damages owed by the insurers would have to be damages not subject to indemnification or contribution by a subcontractor. Second, the damages would have to have been covered under an applicable insurance policy.[5]

¶12 Statements by K&W's attorneys before the circuit court and their briefing on appeal indicate that they agree with the proposition that, after the settlement agreement, K&W's burden expanded to include distinguishing liability and damages among Sullivan, Sullivan's insurers, and the subcontractors. For example, when discussing the admissibility of expert witness Jim Schumacher's damages opinions, an attorney for K&W acknowledged that Schumacher's "calculations as to cost of repairs divided out by defect and by trade were [first] done" after the settlement agreement because "until we reached the settlement with Sullivan I guess there was no real purpose in having an expert that would have to do those allocations." The only dispute in this regard seems to be a timing dispute, that is, when during the trial K&W would need to deal with this topic. In their brief-in-chief, K&W write in a footnote that they "objected to the court's decision to allow third parties to participate in phase one [of the trial] concerning

[5] Before the circuit court, K&W's attorneys pointed out that there might later arise issues regarding policy coverage disputes, but we find no suggestion by K&W's attorneys that this situation mattered for purposes of the dismissal issues addressed by the circuit court.

Sullivan's liability to [K&W]." In a reply brief, K&W say their "position was, and remains, that [the] contribution/indemnity claims [they acquired from Sullivan] would ripen only if, and when, Sullivan's liability to [K&W] had been established."[6] Thus, although K&W do not, in their appellate briefs, discuss the effect of the settlement agreement on their burden at trial,[7] our description of that burden is consistent with positions they have taken.

¶13 Accordingly, it is our understanding, and we think the understanding of the circuit court, that one effect of the settlement agreement was that K&W took on the burden of proving, with respect to each remaining adverse party, the amount that party was required to contribute toward the total damages that K&W could prove Sullivan owed to K&W. With this understanding in mind, we address K&W's arguments.

B. Dismissals Of The Adverse Parties At Trial

¶14 K&W argue that the circuit court erred when dismissing the remaining subcontractors and Sullivan's insurers. K&W's primary argument is based on the proposition that the circuit court wrongly believed that April 18,

[6] Although K&W seem to complain about the circuit court's decision to address all liability issues at the same time, they do not argue that this decision is cause for reversal. Moreover, we note that the circuit court's decision, and our own, is based on the proposition that the circuit court was not required to continue with a trial once it became clear that K&W could not meet their burden of proof during both the liability phase (no matter how it was parsed) and the damages phase.

[7] As noted in the text, K&W have not provided us with an explanation of the effect of the settlement agreement on K&W's burden at trial. Perhaps K&W believe the effect is obvious. If so, we disagree. The absence of this explanation made our task substantially more difficult. Because of this omission, we could have rejected all of K&W's arguments relating to alleged contract breaches by Sullivan as insufficiently developed. Instead, we have chosen to review the settlement agreement and related portions of the record to gain an understanding of what K&W would have been required to prove at trial.

2002, the day Sullivan walked off the job, was an important date because it affected Sullivan's liability and, therefore, the liability of the subcontractors. K&W's view is that the quit date is unimportant because Sullivan's liability was not affected by its quitting. This issue matters, in K&W's view, because it was the basis for the circuit court's decision to exclude K&W's expert damages testimony, which undermined K&W's case and led to the dismissals.[8]

¶15 Before explaining the flaws in K&W's reasoning, we address and put to the side issues that either do not matter or have not been sufficiently preserved or briefed by K&W.

1. Directed Verdict Procedure

¶16 K&W argue that the circuit court lacked "authority" to grant directed verdicts at the early stages of the trial. As explained by K&W, this portion of their argument is directed only at the ruling specifically identified as a directed verdict by the circuit court. That ruling resolved the remaining claims involving Sullivan's insurers and Mead & Hunt. K&W's contention is that "[a] motion for a directed verdict may be made at the close of the plaintiff's evidence," citing WIS. STAT. § 805.14,[9] and that it is "contrary to state law" to do what the court did here, namely, to grant directed verdicts "prior to the presentation of any evidence." We reject this argument as forfeited.

[8] We note that K&W do not argue here, and did not argue before the circuit court, that they could adequately account for their construction-related damages without expert testimony. *See* ***Racine Cnty. v. Oracular Milwaukee, Inc.***, 2010 WI 25, ¶28, 323 Wis. 2d 682, 781 N.W.2d 88 ("Expert testimony is often required when 'unusually complex or esoteric' issues are before the jury because it serves to assist the trier of fact.").

[9] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

¶17 K&W do not point to any place in the record where they preserved this argument. When the circuit court rendered its decision, K&W's counsel failed to raise the objection made on appeal. In fact, K&W's counsel seemingly acknowledged that the court's prior decision to exclude K&W's expert witness on damages justified ending K&W's case. K&W's counsel asserted that, "stripping them of the Schumacher [damages] testimony, they will be denied [their] day in court." Consistent with this acknowledgment, the court then stated: "I have no choice but to grant the motion for directed verdict." We deem K&W's challenge forfeited. *See* ***State v. Rogers***, 196 Wis. 2d 817, 825-27, 539 N.W.2d 897 (Ct. App. 1995) (to preserve an argument, a party must raise the argument before the circuit court).

¶18 Furthermore, even if K&W had not forfeited the argument, K&W do not explain how they were harmed by the court's decision. That is, K&W do not explain why, if the circuit court and apparently K&W themselves were correct that K&W could not prevail at trial because of an inability to prove damages, K&W were harmed by being prohibited from presenting that insufficient evidence.[10]

¶19 Elsewhere in their brief-in-chief, under a "due process" heading, K&W raise a different procedural argument. K&W seem to complain that Sullivan improperly moved for a directed verdict even though Sullivan was not a "party" contemplated by the directed verdict statute, WIS. STAT. § 805.14, but rather had already been dismissed after reaching the settlement with K&W.

[10] For the same reason, to the extent K&W may be arguing about the timing of the circuit court's "dismissals" at trial as to the other subcontractors, we would reject the argument.

¶20 K&W point us to a subsequent circuit court order where the court purported to grant a directed verdict to Sullivan and its insurers, General Casualty and Regent, collectively. To the extent that K&W point out that Sullivan was already dismissed, and thereafter could not, as a dismissed party, be entitled to a directed verdict, K&W do not explain why this would have mattered. Sullivan's inclusion in the directed verdict order was at worst superfluous.

¶21 K&W may mean to argue that the circuit court's directed verdict order was improper because no non-dismissed party ever moved for a directed verdict. If K&W mean to argue this, it is meritless. The record reveals that, at the time of the motion, the attorney who orally moved for a directed verdict was representing the interests of Sullivan's insurers on the merits.

2. Assumptions In K&W's Favor

¶22 K&W and the respondents spend considerable time arguing over whether Sullivan was contractually responsible for the work of all subcontractors and over whether Sullivan breached its contract with K&W when Sullivan walked off the job site on April 18, 2002. The circuit court's primary reasoning, however, does not depend on resolving these disputes against K&W.[11]

[11] K&W seem to assert that the circuit court erred because it did not grant K&W the assumption that Sullivan's walking off the job was a breach of the contract. We disagree that the court did not grant this assumption. But more to the point, it should be apparent to K&W that the circuit court's primary reasoning does not depend on resolving these disputes against K&W. And, although the respondents could have discussed this issue more clearly, the responsive briefing should have put K&W on notice that this is the view of at least some respondents. For example, Sullivan's insurers state that "whether Sullivan breached the contract by leaving the job on April 18, 2002, was irrelevant to the court's rulings." Further, Sullivan's insurers make the point that Sullivan's contractual responsibility to K&W for the work of the subcontractors does not matter because, regardless of any such contractual obligation, the nature of Sullivan's responsibility for the work of others changed on April 18, 2002, when Sullivan was no longer acting as the general contractor.

¶23 For purposes of this decision, we will assume without deciding that the contract between Sullivan and K&W made Sullivan responsible for the work of all of the subcontractors. We will further assume that Sullivan breached its contract with K&W when Sullivan walked off the job on April 18. As we explain below, even making these assumptions in favor of K&W, the circuit court's core reasoning supported dismissing all of the subcontractors and insurers.

3. Alternative Arguments About Pre-April 18 Deficiencies

¶24 In their briefing, K&W make assertions that, seemingly, amount to alternative arguments. K&W seem to assert that, even assuming the April 18 quit date matters, K&W could have offered expert testimony supporting verdicts against some adverse parties because a portion of the testimony would have referred to other flawed work that was in place prior to April 18, 2002. In the following paragraphs, we explain why K&W's assertions along these lines fail to persuade us.

i. Building Envelope Deficiencies

¶25 The circuit court excluded testimony from K&W's building envelope expert, Francois Perreault. Based on K&W having conducted unauthorized destructive testing on the house, portions of Perreault's expert reports and corresponding testimony were excluded, and K&W do not appeal that ruling. Other aspects of Perreault's reports and testimony were excluded because Perreault's reports did not account for Sullivan's quit date.

¶26 In their brief-in-chief, K&W seem to assert that these latter exclusions were erroneous, regardless of the quit date, because Perreault could have testified that some deficiencies existed before the quit date. K&W, however,

merely assert that Perreault could have done this; they do not provide a meaningful explanation as to why this is true. The record reveals that the circuit court required that K&W disclose their experts and "the opinions(s) to be offered and the basis for the opinion(s)" by August 1, 2007. K&W made disclosures as to Perreault, but it is undisputed that those disclosures did not include an opinion about whether certain flaws were in place before or after April 18, 2002, or whether defective work occurring after April 18 was a consequence of Sullivan's quit. K&W do not explain how Perreault could have properly testified on these topics. Thus, this argument lacks necessary development on appeal.

¶27 In a reply argument, K&W seem to offer a different approach. That is, they argue that the timing of defective work could have been shown by different non-expert witnesses who had worked on the project. Thus, K&W seemingly mean to assert that the timing of the defective work at issue could be determined by looking to a combination of testimony from workers on the job site and from Perreault. This argument fails because it is nothing more than a broad outline of an argument.

¶28 K&W simply identify two potential lay witnesses and vaguely refer to "their anticipated testimony." K&W then state: "Had [K&W] been allowed to present its case, the jury would have heard who performed defective work, and when." K&W offer not a single example of pre-April 18 flawed work that could have been proven by admissible lay witness testimony viewed in combination with admissible testimony from Perreault. Moreover, as should become apparent from our discussion below, K&W's assertions provide no path to properly matching up specific defects with specific damage amounts. K&W discuss only a total remediation estimate of over $7 million, but provide no path to allocating that total figure based on pre-April 18 deficiencies, including pre-April 18 building

envelope deficiencies. Our review of the record reveals that K&W's lay-witnesses/Perreault argument they made to the circuit court was similarly too general to be helpful.

ii. Structural Engineering Deficiencies

¶29 K&W point out that their structural engineering expert, Loei Badreddine, could have identified pre-April 18 structural steel flaws attributable to Mead & Hunt, the project's structural engineering subcontractor. K&W assert that Badreddine's testimony should be viewed in combination with their damages testimony from expert witness Jim Schumacher. We discuss Schumacher's testimony in more detail below. Here, it is enough to explain that K&W assert that the combination of the Badreddine-Schumacher testimony would have supported a verdict against Sullivan and Mead & Hunt relating to the structural steel because the steel work was plainly finished before April 18. As explained below, we deem this argument forfeited and, regardless of forfeiture, would reject it for reasons similar to those discussed elsewhere in this opinion.

¶30 Our review of the record reveals that K&W did not clearly raise this argument when the circuit court excluded Schumacher's damages testimony. At that time, K&W made a different argument—that the April 18 date should not matter based on the reasoning we reject in section I.B.4., below. K&W did not argue that, even if the April 18 date mattered, it was irrelevant to the subset of work identified by Badreddine.[12] The failure to timely raise the argument

[12] At the pertinent place in the record, K&W did mention the Badreddine report, but they did not clearly explain that the report supported the alternative argument they raise on appeal. Before the circuit court, Sullivan's insurers argued that Schumacher should not be allowed to testify because his report and related testimony was based solely on other stricken reports. In (continued)

constitutes forfeiture, and we reject it for that reason. *See* ***Rogers***, 196 Wis. 2d at 825-27.

¶31 We further observe that, had this argument been preserved, it lacks adequate development on appeal. Even if we assume that admissible evidence would have demonstrated that, as K&W assert, "the structure of the house was in place before [April 18, 2002,]" and was "deficient," K&W still do not explain how a jury would have been able to allocate a portion of their asserted $7,476,337 in total damages to the Badreddine-identified structural flaws attributable to Mead & Hunt.

4. Sullivan's Quit Date

¶32 We turn to K&W's primary argument—that the circuit court was mistaken in believing that April 18, 2002, the day Sullivan walked off the job and ceased functioning as the general contractor, matters to properly allocating damages. We note that this quit date issue goes hand in hand with the circuit court's decisions to exclude expert testimony. K&W's view is that the quit date does not matter because Sullivan remained responsible for K&W's damages before *and after* the quit date. Consistent with K&W's view, their only damages expert, Schumacher, did not take into account the quit date. Apart from what we have already addressed, K&W effectively concede that, if they are incorrect about

response to that argument, K&W merely asserted that Schumacher, in addition to relying on the stricken reports, also relied on the Badreddine report, which "has not been stricken."

the quit date's significance, then the circuit court properly excluded Schumacher's testimony.[13]

¶33 K&W assert that Sullivan had "overarching responsibility for the entire construction project," and that "defective work done by anyone working on the project [before or after April 18, 2002,] was Sullivan's responsibility." Under K&W's apparent view, the April 18 date is irrelevant because, as a matter of law, Sullivan was responsible for all mistakes made before and after that date because Sullivan was contractually bound to deliver a defect-free completed building. The flaw in this argument is K&W's failure to come to grips with the difference in how a jury would measure damages based on Sullivan's responsibility before and after the quit date.

¶34 As to damages attributable to work done prior to April 18, 2002, Sullivan's liability stems from any failure by Sullivan to comply with the contract terms. But the relationship between Sullivan and K&W fundamentally changed when Sullivan walked off the job. This changed relationship is reflected in how damages would be measured. After April 18, 2002, Sullivan's liability would have been measured by determining the natural and probable consequences of Sullivan's breach.[14] *See* ***Peterson v. Cornerstone Prop. Dev., LLC***, 2006 WI App

[13] In the course of their argument, K&W refer to specific contract language, including a warranty provision. To the extent that K&W cite the contract to demonstrate that Sullivan was responsible for all pre-quit work, we assume for purposes of this appeal that K&W is correct. But K&W's discussion of contract language sheds no light on what happens in the event that Sullivan breaches the contract by ceasing to act as the general contractor. Accordingly, we need not and do not separately discuss the contract language for purposes of addressing K&W's argument.

[14] K&W acknowledge that this is the applicable measure and point out that what is a natural and probable consequence of a breach would typically be a question for the jury, but K&W do not, as we do in the above text, address the actual effect of the quit date on the measurement of damages. It should be apparent from the text that the admissible evidence would have been insufficient to support a jury verdict on damages.

132, ¶50, 294 Wis. 2d 800, 720 N.W.2d 716 (consequential damages for a breach are "'limited to such damages as are the natural and probable consequences of the breach and were within contemplation of the parties when the contract was made'" (citation omitted)). Thus, a properly instructed jury would have been asked to measure damages—attributable to defective work—differently depending on whether the defective work was done before or after April 18, 2002.

¶35 By way of illustration, suppose a general contractor enters an agreement with a landowner to build a house and, as part of that agreement, the general contractor agrees to be responsible for the work done by a plumbing subcontractor. The plumbing subcontractor proceeds to lay water lines between the water main and places where plumbing fixtures will be installed. At this point, a dispute arises between the general contractor and the owner and the general contractor breaches the contract by quitting the job. Thereafter, the owner takes over as the general contractor, and the same plumber continues and installs the fixtures. The water lines installed prior to the general contractor quit date are defective and leak because of defects in the materials, not because of errors by the plumber. The fixtures installed after the quit date leak because of defective work by the plumber.

¶36 In this scenario, the general contractor would be liable for the cost to repair defective plumbing in place before the general contractor walked off the job. For example, the general contractor would be liable for water damage that occurred after the quit date if the damage is attributable to plumbing in place prior to the general contractor's quit date. However, the general contractor is not necessarily liable for water damage resulting from the defective installation of plumbing fixtures after the quit date. Rather, the question would be whether the water damage caused by improperly installed fixtures was a natural and probable

consequence of the general contractor's breach. Absent unusual circumstances, such as a foreseeable inability to replace the general contractor, the answer would be no. Although it might be foreseeable that the homeowner would incur additional expense hiring a new plumber or incur additional expense because of delays caused by the breach, it would normally be unreasonable to find that the plumber's subsequent errors were a natural and probable consequence of the general contractor's breach. That is, it is not apparent why a natural and probable consequence of one general contractor quitting is that a homeowner would hire a new general contractor who is incompetent.

¶37 Accordingly, K&W are wrong when they assert that Sullivan is necessarily responsible for all defective work after the quit date. Sullivan would be responsible only for defective work after that date if the defective work was a natural and probable consequence of Sullivan walking off the job or of other breaches by Sullivan prior to its quit date. This difference, in turn, renders the damages evidence offered by K&W insufficient as a matter of law for the reasons that follow.

¶38 K&W do not explain that they would have been able to prove at trial that no defective work occurred after the April 18, 2002 quit date.[15] And it is undisputed that the approach K&W's damages expert took to estimating damages did not distinguish between defective work done before or after the quit date. For that matter, the only specific figure that K&W point us to is a July 2007 estimate

[15] To clarify, we do not conclude that this could not be done, but rather we rely on the fact that K&W have not, in this appeal, explained that it could be done, and they also do not point us to a place in the record where they argued this before the circuit court. Thus, even if they had made this kind of argument on appeal, they have not shown that it was preserved.

providing a single total of the estimated cost ($7,476,337) to perform work on the house several years after the quit date, between April 1, 2008, and November 30, 2008, and transform it into the home K&W bargained for. Thus, K&W do not present a basis on which the jury could have determined the portion of the total damage figure attributable to Sullivan.

¶39 K&W seemingly believe that it is sufficient to point out that it is obvious that *most* of their damages are attributable to defects that Sullivan must have been responsible for before walking off the job. K&W argue that the home was 80 to 85% complete when Sullivan walked off the job and that a major defect, the steel work, was obviously complete by the quit date. But even if these contentions are true, K&W do not explain how a jury would have been able to sensibly apportion the proffered $7,476,337 total damages figure. More specifically, K&W did not in the circuit court and do not on appeal even attempt to explain how a jury might determine the portion of the total remediation estimate that is attributable to Sullivan under the correct view of Sullivan's liability that we describe above.

¶40 For the same reason, K&W provide no workable avenue for differentiating between damages that might be owed by subcontractors. As we have explained, K&W proceeded in the shoes of Sullivan for contribution and indemnification purposes, and differentiation between each subcontractor's work and the corresponding damages would, therefore, be necessary. K&W do not meaningfully address this. It is evident that this would require testimony about the technical interactions of the building components to understand how each component's flaw (and the corresponding subcontractor's fault) should be allocated when analyzing the house as a finished product. For example, for all we know from the arguments before us, work by one subcontractor might add to or

subtract from the strength or integrity of work by another subcontractor. And, it would seem to be K&W's view that multiple subcontractors were responsible for flawed work. To have a workable theory, K&W needed to provide a way to allocate the total costs figure that would take into account these and other complexities.

¶41 Finally, we note that K&W's reliance on ***Brooks v. Hayes***, 133 Wis. 2d 228, 395 N.W.2d 167 (1986), is misplaced. K&W cite ***Brooks*** for the proposition that, absent a written novation from K&W absolving Sullivan of responsibility, Sullivan remained responsible for all defective work done on the home after April 18, 2002, regardless who performed or supervised the work. K&W argues that, under ***Brooks***, when "a general contractor [is] contractually responsible for the quality of workmanship on a house, that responsibility cannot be avoided, absent a written novation from the owner, regardless who delegated whom to perform that work." ***Brooks***, however, addressed work that was done while the general contractor remained on the job and was contractually responsible for the work done. ***Brooks*** does not purport to address all situations and, in particular, does not address what happens when a general contractor walks off the job, thereby ceasing to act as the general contractor.

C. Due Process Arguments

¶42 K&W assert that their "procedural due process" rights were violated. K&W's assertions along these lines concern other subcontractors that did work on the house and were dismissed at various times in the course of this case. These entities are Southern Wisconsin Roofing, Artistic Stone, Schultz Electric,

Architectural Metal, and Christopher Bozyk Architects.[16] K&W assert that they were denied their right to have a meaningful opportunity to present argument on the dismissal of these parties.

¶43 Given our discussion above, we question whether K&W's arguments along these lines matter. As we have explained, K&W do not come to terms with the fact that they stood in Sullivan's shoes for contribution and indemnification purposes as to all subcontractors and that Sullivan's quit date mattered for purposes of properly allocating damages. K&W's due process arguments are all ultimately aimed at showing that Sullivan was, in addition, responsible for these subcontractors. However, we have already explained why their damages argument fails as to subcontractors that are parties to this appeal. K&W give us no reason to treat other subcontractors differently.

¶44 For the sake of completeness, however, we explain that K&W's due process arguments are not persuasive for other reasons.

¶45 As to the dismissals of Southern Wisconsin Roofing, Artistic Stone, Schultz Electric, and Architectural Metal, K&W assert that they should have been allowed to raise arguments about those dismissals in conjunction with a circuit court order issued August 18, 2010.[17] Those entities were dismissed at summary judgment in March 2008 and March 2010. K&W concede that the March 2008

[16] K&W also raise an argument under their "due process" heading that pertains to our discussion in part I.B.4., in which K&W assert that requiring them to account for the quit date improperly shifted a burden to K&W. Our previous discussion already explains why the quit date was something K&W needed to account for.

[17] The August 18, 2010 order partially amended a previous January 29, 2008 order that had formed the basis for the March 2008 and March 2010 summary judgment orders that dismissed these parties.

and March 2010 summary judgment orders dismissing the four entities were "final orders." What is missing from K&W's argument is an explanation of why K&W should have the opportunity to make arguments about these entities at this late date.

¶46 K&W merely state: "At the time [of the dismissals], [K&W] had not yet been assigned Sullivan's indemnity/contribution claims, and were unable to successfully appeal the dismissal orders." This comment, however, suggests only that Sullivan no longer had viable indemnity/contribution claims against these entities at the time Sullivan assigned its right to such claims to K&W. Moreover, K&W do not explain why an appeal filed in May 2011 might be timely as to dismissals that were entered in March 2008 and March 2010.

¶47 K&W also direct due process arguments at the dismissal of another entity, Christopher Bozyk Architects. K&W discuss two rulings by the circuit court related to Bozyk. These arguments are no more persuasive.

¶48 K&W complain that the circuit court, in an August 18, 2010 order, "effectively nullified" any claim against Bozyk "without the court entertaining any argument about the propriety of that action." K&W do not support this assertion with developed argument. K&W are apparently referring to the fact that, in the August 2010 order, the circuit court ruled that only entities with written or oral agreements with Sullivan were proper parties in this case, and that the court further ruled that there was no evidence of an oral or written agreement with Bozyk. K&W, however, do not go on to explain what "argument about the propriety of that action" they should have been able to make, but were denied the opportunity to make. For that matter, K&W do not explain why they could not

have raised arguments in subsequent proceedings, such as the proceeding we discuss in the next paragraphs.

¶49 K&W also complain that they were denied an opportunity to present argument on Bozyk's dismissal from the case, which occurred months later. To this end, K&W assert that it matters that Bozyk never filed a motion to dismiss but was nonetheless dismissed based on a differently labeled motion. K&W are referring to the fact that, on November 5, 2010, Bozyk filed a document labeled as "motions in limine." In that filing, Bozyk requested this ruling: "That the third-party defendant, Christopher Bozyk Architects, Ltd., as a matter of law, has no liability by virtue of the prior Order of the Court ...." K&W participated at the hearing where the circuit court addressed Bozyk's request and, on this topic, stated: "without waiving our prior objection to [the court's] ruling …, we don't oppose the motion." K&W explain in their brief that their statement to the circuit court was an acknowledgment that Bozyk's request "effectively had been granted when [the August 18, 2010] order was issued." On November 22, 2010, the circuit court issued an order stating that Bozyk had "moved for dismissal" and that the motion "has not been opposed." On December 21, 2010, the court signed a final judgment dismissing Bozyk.

¶50 K&W seem to complain that their due process rights were violated because the circuit court, in effect, treated Bozyk's "motion in limine" as a motion to dismiss. K&W, however, concede that they had an opportunity to respond to Bozyk's motion seeking a ruling that it "has no liability" and they did not take that opportunity to make the argument they now make on appeal, that is, that Bozyk was legally required to bring its dismissal request in a separate motion. Thus, K&W have forfeited any argument that the motion in limine was the wrong vehicle. And, regardless of forfeiture, we perceive no unfairness to K&W. K&W

were not deprived of an opportunity to address the merits of the issue. Accordingly, we reject their due process argument.

II. Arguments Related To Other Claims

A. False Lien And Malicious Prosecution Claims

¶51 K&W also complain about directed verdicts for a false lien claim and a related malicious prosecution claim against Sullivan.[18] For our purposes, the only thing that matters about these claims and the circuit court's ruling is that the court based its ruling on its understanding that K&W was not prepared to offer the necessary testimony to support damages for those claims. On appeal, K&W assert that this ruling was erroneous. Specifically, K&W contend that "the damages connected with those claims included attorneys' fees, and that [K&W] could establish the amount of those fees through their testimony." We reject this argument because it has been forfeited.

¶52 When this topic was addressed before the circuit court, Sullivan's insurers argued that K&W needed an expert to establish the reasonableness of attorney fees, that K&W lacked such an expert, and, therefore, K&W had no testimony to offer supporting damages related to these claims. The circuit court indicated its agreement with Sullivan's insurers that K&W needed an expert for this purpose. After Sullivan's insurers argued this and the circuit court agreed,

[18] In 2002, Sullivan brought a construction lien claim against K&W. In August 2006, the circuit court granted K&W's unopposed motion for partial summary judgment on the lien claim, and the court ordered that Sullivan vacate all construction liens on the property. K&W then brought claims against Sullivan for filing a false lien claim and for malicious prosecution of that lien claim and a second lien against the property.

K&W did not offer a counterargument, but rather simply seemed to concede that they did not have an expert for this purpose.

¶53 The circuit court then orally ruled: "Under those circumstances, I find there is not going to be testimony sufficient to pursue the claim for either malicious prosecution or the false lien defamation of title claim, and I therefore grant a directed verdict with regard to those claims as well." After the court made this ruling, K&W did not speak up to argue that this ruling was flawed. That was the proper time to raise the argument. In sum, neither before nor after the pertinent ruling did K&W raise the argument they now make on appeal. Therefore, we decline to address the argument here.[19] *See* ***Rogers***, 196 Wis. 2d at 825-27.

B. Bad Faith Claims

¶54 K&W complain about the dismissal of their bad faith claims against Sullivan's insurers, General Casualty and Regent. Those claims relate to K&W's belief that the insurers had a duty to defend K&W from certain affirmative defenses and a counterclaim. We reject the argument because K&W fails to support its premise.[20]

[19] Also on the topic of damages associated with these claims, K&W assert in a footnote: "[K&W] also incurred higher mortgage interest rates due to the liens, which they could establish." This argument is likewise forfeited because it was not made before the circuit court.

[20] K&W's brief, at least twice, mentions the dismissal of another claim against General Casualty for asserting a frivolous defense. However, K&W do not provide a corresponding developed argument. Accordingly, we do not separately address K&W's frivolous defense claim against General Casualty.

¶55 K&W's argument is based on the fact that Sullivan's insurance policies named K&W as an "additional insured." K&W's position is that, because they were "additional insured[s]," Sullivan's insurers had a duty to defend K&W in certain circumstances. K&W's premise is that the duty was triggered here because K&W were at risk of having to "pay … damages" based on certain affirmative defenses and a counterclaim. To simplify this discussion, we will assume for argument's sake that K&W's general premise is correct—that a duty to defend arose if K&W were subject to paying damages to someone based on defenses or counterclaims. K&W do not, however, show that the duty to defend was triggered because they do not show that they were subject to paying damages.

¶56 After K&W brought claims alleging defective work, Sullivan and certain subcontractors raised affirmative defenses and a counterclaim directed at K&W. The affirmative defenses from Sullivan included that "[K&W] have failed to mitigate their damages" and "the losses or damages allegedly sustained by [K&W] may have been the result of their own negligence." The affirmative defenses that K&W point to from subcontractors are similar, and we need not list them individually here. It suffices to observe that the affirmative defenses all plainly had the purpose of negating or reducing damages K&W might have otherwise been entitled to.

¶57 K&W also point to a counterclaim related to K&W having engaged in destruction of evidence by altering their house. The counterclaim states: "If it is determined that [the subcontractor] is liable to any party in this action for claimed damages, and in the event that the destructive testing or repairs performed by [K&W] results in destruction or alteration of critically probative evidence that prejudices [the subcontractor's] ability to defend itself at trial, [the subcontractor]

shall be entitled to a judgment by way of indemnification and/or contribution from [K&W]."

¶58 Referring to these defenses and the counterclaim, K&W assert that the insurers' duty was triggered because the policies provide "for payment of sums [K&W] are obligated to pay as damages," and K&W baldly assert that these defenses and counterclaim "could not have been characterized as merely set-offs." But K&W do not coherently explain why this is so.

¶59 So far as we can discern, the affirmative defenses contemplate a reduction of the damages that Sullivan and the subcontractors might have to pay K&W, either directly or indirectly, and nothing more. Similarly, the counterclaim would only be triggered "[i]f it is determined that [the subcontractor] is liable to any party." Logically, the subcontractor might be liable to "any party" if K&W succeeded on a claim against Sullivan or the subcontractor, and the subcontractor was held liable for the damages either directly or via contribution. So far as we can tell, in neither scenario would K&W pay damages. If there is another plausible scenario, K&W do not explain what it would be.

Conclusion

¶60 For the reasons discussed, we affirm the circuit court.

By the Court.—Judgments and orders affirmed.

Not recommended for publication in the official reports.