COURT OF APPEALS
DECISION
DATED AND FILED

November 4, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2096 **Cir. Ct. No. 2006CV110**

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

H & C R.E. INVESTMENT, PARTNERSHIP, ALLEN J. CARNINE AND JAMES HAUPT,

PLAINTIFFS-RESPONDENTS,

V.

PEMBER EXCAVATING, INC.,

DEFENDANT-APPELLANT,

J. RYAN BONDING, INC., OGDEN ENGINEERING, CONTINENTAL CASUALTY CO., AMERICAN CASUALTY CO. OF READING PA, NATIONAL FIRE INS. CO. OF HARTFORD, CCC SURETY COMPANIES AND WEST BEND MUTUAL INS. CO.,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Polk County: EDWARD F. VLACK III, Judge. *Affirmed in part; reversed in part.*

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Pember Excavating, Inc. appeals a judgment for damages in a contract dispute. After a bench trial, the court awarded two categories of damages to H & C R.E. Investment, Partnership; Allen Carnine; and James Haupt (collectively, "H & C"). First, the court awarded $152,541.73, representing the cost of repairing sanitary sewer laterals that were damaged due to Pember's faulty workmanship. Second, the court awarded $264,500 in lost profits due to an inability to sell eight vacant lots because of the lateral problems.

¶2 Pember argues the court erroneously awarded damages for the sewer lateral repairs because the sewer system had already been dedicated to the City of Amery, leaving H & C with no property interest in the laterals. We agree and reverse that part of the judgment awarding damages for sewer repairs. However, we reject Pember's argument that H & C failed to adequately prove its lost profits. We therefore affirm that part of the judgment awarding damages for lost profits.

BACKGROUND

¶3 H & C is a real estate development partnership. As part of a twenty-six lot residential development in the City of Amery, H & C sought to extend sewer and water utilities along a new road. H & C hired Ogden Engineering as the project engineer. Ogden was also the city's contracted engineer, and therefore operated in a dual capacity. H & C contracted with Pember for the excavation and utility work, and the contract specified the city as the project inspector.

¶4 Pember was responsible for construction of sanitary sewer, water main, storm sewer, concrete curb and gutter, crushed aggregate bases, asphaltic concrete pavement, grading and all other items necessary to complete the work.

The sanitary sewer system Ogden designed consisted of a main sewer line and various laterals extending from the main line to the individual lots. The main and laterals were all constructed within the road right-of-way. At the lot line, the laterals would tie into private sewers constructed by homeowners.

¶5 Pember installed the sewer system from March through May 2000. When tested, however, the system failed both an air test and mandrel test.[1] Public works supervisor John Frisco, who expressed concerns about proper soil compaction during construction, determined the failures were caused by settling due to improper compaction. Pember attempted repairs at various wye joints between the main and laterals, but the system still failed the mandrel test.

¶6 In August 2001, Pember hired a firm called Infratech, which specializes in videotaping sewer systems and conducting in-line repairs. Infratech discovered and repaired various problems in both the main line and several wye locations. H & C began selling lots in the new subdivision in the fall of 2001, but sewer problems persisted.

¶7 In December, Ogden wrote the city a letter memorializing an agreement for further repairs at many of the lateral wye connections. The letter provided:

> We understand that the City of Amery will conditionally accept the improvements on this project with the following conditions:
>
> 1. Pember Excavating will, at their cost, have the sanitary sewer repaired as outlined in our October 15, 2002 letter.

[1] The air test determines if the system is sealed. The mandrel test determines whether the sewer lines maintained their circular shape after burial.

> 2. The entire sanitary sewer main line and 40' of each lateral shall be televised at Pember Excavating's expense one year after the above repairs are made.
>
> 3. The City of Amery reviews the televised report and finds the sanitary sewer to be in [acceptable] condition ….

In late January 2003, Pember wrote Ogden a letter agreeing to the proposal outlined in Ogden's letters. Infratech completed the repairs in March. Frisco wrote Pember in May, expressing his approval of the repairs. That letter stated, in part:

> THIS LETTER IS A DOCUMENTATION OF AN AGREEMENT REACHED BY PEMBER EXCAVATING, THE CITY OF AMERY, JAMES FILKINS, JOE CARNINE, AND JAMES HAUPT, PURSUANT TO PROJECT COMPLETION AND WARRANTY MATTERS.
>
> WITH THE REPAIRS MADE AND THE VIDEO HAVING BEEN REVIEWED AND ACCEPTED, THE EXISTING WORK WILL NOW BECOME THE PROPERTY OF THE CITY OF AMERY, AND AGAIN, SUBJECT TO WARRANTY THROUGH FEBRUARY 3, 2004, BY PEMBER'S BONDING COMPANY.

The letter also acknowledged the effective date was February 3, 2003.

¶8 Consistent with the agreement, Infratech videotaped the system in January 2004. In the meantime, the curb and gutter and first level of road paving had been installed. The video revealed additional problems with the laterals. The city first attempted, unsuccessfully, to have Pember make additional repairs. It then made a claim against Pember's performance bond, but the issuing companies never responded.[2] Consequently, Frisco informed H & C in October 2004 that the

[2] Neither the city nor H & C filed suit against the bond companies prior to expiration of the bond's limitations period.

city would not be held responsible for future connections to several defective laterals and that it would refuse to issue building permits for three vacant lots where the laterals had already totally failed.

¶9 At the time of the city's notice, H & C still owned eight lots in the subdivision. Seven laterals in the subdivision needed repair, three of which served H & C's remaining lots. H & C filed the present suit against Pember, alleging breach of contract. H & C's experts opined it would cost $152,541.73 to repair the seven defective laterals. Pember's expert did not review all seven laterals, but opined it would cost $41,444.60 to repair the three defective laterals serving H & C's lots. H & C also claimed a $264,500 loss of profits[3] due to its inability to sell its remaining lots from 2004-2007, after the city's October 2004 notice. The trial court found Pember was liable for breach of contract, and it awarded H & C the full amount of its requested damages. Pember appeals.

DISCUSSION

Damages awarded for repairing sewer laterals

¶10 Pember first argues the court erroneously awarded H & C damages attributable to repair costs for the seven damaged sewer laterals. Pember contends H & C could not recover costs to repair property that it did not own. We agree.

¶11 When land is subdivided, roads, streets, and other public spaces are created by means of dedication to the public. ***Vande Zande v. Town of Marquette***, 2008 WI App 144, ¶8, 314 Wis. 2d 143, 758 N.W.2d 187.

[3] $118,500 of the lost profits was attributed directly to lost sales, while $145,980 was attributed to the consequent failure to realize 9% reinvestment profits.

"Dedication is … the act of giving or devoting property to some proper object, in such a way as to conclude the owner." ***Cohn v. Town of Randall***, 2001 WI App 176, ¶6, 247 Wis. 2d 118, 633 N.W.2d 674 (quoted source omitted). The trial court, in its written final decision, found that the city accepted dedication of the "sanitary sewer main and laterals" in February 2003, and that the "existing work" became city property at that time.

¶12 A trial court's findings of fact will be upheld unless clearly erroneous. ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988) (citing WIS. STAT. § 805.17(2)).[4] A court's findings are clearly erroneous when they are against the great weight and clear preponderance of the evidence. ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983).

¶13 H & C essentially offers two arguments in response to Pember's contention that H & C could not recover repair costs for sewer laterals that it did not own. First, H & C asserts Pember never raised the issue below. H & C is mistaken. Pember raised the issue in a summary judgment motion, and the trial court's final decision acknowledged as much.[5]

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[4] All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[5] The trial court's final decision provides:

> [T]his Court concludes there was a dedication … and upon acceptance by the City of Amery, fee title to the street and utilities is vested in the City of Amery. This Court previously concluded in its decision of January 14, 2010, that the dedication and acceptance did not, in and of itself, release Pember from any liability under its contract with [H & C]. After re-analyzing the evidence in this case presented at trial, this Court again concludes that the act of accepting the dedication only means that fee simple title now rests in the City of Amery.

(continued)

¶14 Second, H & C contends Pember's argument is unsupported by the record and based on a false premise because, while the sewer main was public property, the sewer laterals were private property. H & C asserts:

> This is just made up stuff. No record citations are offered and no evidence suggests the City of Amery owns the "sewers." The City of Amery owns **part** of the sewers, the main, but other parts of the "sewers," the laterals, are on private property and not owned by the City of Amery. Pember ought to know this, they are in the business of installing sewers! The fact of dedication has no bearing on the breach of contract damages for the cost of repairing the sewer laterals located under private property.

Contrary to H & C's assertion, Pember's argument is supported by the record.[6] Accusations, boldface, and exclamation points provide an ineffective cloak for the facts. Indeed, it is not lost on us that H & C's assertion, that the laterals are on private property, is itself unsupported by any citation to the record.

¶15 As set forth above, the trial court's final decision states the city accepted dedication of the main *and* laterals. This finding is amply supported by the record. The city's May 5, 2003 letter discussed repairs to, and inspection of, both the main and laterals, and then acknowledged that "the existing work"

The trial court's January 2010 decision observed:

> Since the City now owns the property, and [H & C does] not have an interest in the property, according to Pember, they cannot bring a claim under the contract. … Therefore, Pember argues that [H & C does] not have standing and are precluded from asserting any claims related to the property owned by the City.

[6] Pember dutifully provides record citations throughout its statement of facts. However, its argument is sparsely supported by record citation. We remind counsel that record citations are to be included in both the fact and argument sections. *See* WIS. STAT. RULE 809.19(1)(d)-(e).

became city property. In Frisco's deposition testimony, read verbatim at trial, he testified as follows:

> Q: Are the laterals that you've talked about … laterals from the main to the end of the right-of-way or to the lot line?
>
> A: Yes, sir.
>
> Q: So those would be part of the public utility?
>
> A: Yes.
>
> Q: And, for example, if the dwelling was constructed on the lot, there will be additional piping that would connect the dwelling to the lateral?
>
> A: That is correct.

Moreover, H & C's own expert's exhibit, which incorporates a copy of the subdivision plan drawing, highlights the seven laterals requiring repair; all seven commence at the main and terminate at the road right-of-way/lot lines.[7]

¶16 Having identified no evidence suggesting the sewer laterals were private property, H & C fails to demonstrate the court's finding to the contrary was clearly erroneous. H & C's argument is based on a false premise, is inadequately developed, and lacks supporting record citation. *See* ***State v. Flynn***, 190 Wis. 2d 31, 39 n.2, 527 N.W.2d 343 (Ct. App. 1994) (we need not address undeveloped arguments); ***Tam v. Luk***, 154 Wis. 2d 282, 291 n.5, 453 N.W.2d 158 (Ct. App. 1990) (we need not address arguments unsupported by record citation). Further, H & C does not dispute that if the city owned the sewer laterals, H & C could not recover monetary damages to repair them. We therefore need not

[7] Consistent with another larger rendering in the record, the expert's exhibit shows that *all* of the sewer laterals in the subdivision plan terminate at the road right-of-way/lot lines.

address the issue further. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (unrefuted arguments are deemed conceded). Accordingly, we reverse that portion of the judgment awarding H & C damages for sewer lateral repairs.

Damages awarded for lost profits

¶17 Pember also challenges the trial court's award of damages for lost profits. Damages for breach of contract compensate the wronged party for damages that arise naturally from the wrong. *See* ***Reiman Assocs., Inc. v. R/A Adver., Inc.***, 102 Wis. 2d 305, 320, 306 N.W.2d 292 (Ct. App. 1981). Findings of fact made by the trial court with regard to damages will not be upset on appeal unless clearly erroneous. ***Three & One Co. v. Geilfuss***, 178 Wis. 2d 400, 410, 504 N.W.2d 393 (Ct. App. 1993).

¶18 H & C introduced testimony that it was unable to sell any lots after the city informed it in 2004 that the city would not be responsible for future connections to defective laterals. In addition to some lots being prohibited from obtaining building permits, H & C had to disclose to prospective buyers that there would be significant future road and sewer repairs and attendant disruption to the neighborhood, which was located along a cul-de-sac. H & C also introduced evidence of past sales, market conditions, and an analysis of projected sales. H & C's witness testified to his experience and education, provided a calculation of lost profits, and explained his methods of calculation. Further, H & C provided a memorandum identifying the claimed losses.

¶19 Pember asserts H & C's evidence of lost profits was mere speculation. Pember characterizes the memorandum as "voodoo economics" and proclaims it is "economic nonsense" and was "obviously built entirely upon

conjecture and speculation." It asserts: "Whatever the memo represents, it is clearly not an appropriate measure of damages in this case. … Whatever the exhibit is supposed to represent, it certainly isn't lost profits." Further, Pember contends that the lost profits claim is "economically sublime" and "ridiculous," and that "[v]irtually everything contained within [the memo] is based upon speculation in the extreme …."

¶20 Pember's argument is full of opinions—a few even address the substance of H & C's lost profits evidence; but the opinions are merely those of appellate counsel. Counsel's opinions are irrelevant. Pember does not identify any evidence that casts doubt on H & C's lost-profits claim. In fact, while H & C notes Pember had an expert witness who testified and disagreed with one component of the lost-profits analysis, Pember does not even mention its own expert or her testimony.

¶21 We conclude Pember fails to adequately develop a reasoned argument. *See* ***Flynn***, 190 Wis. 2d at 39 n.2. In any event, Pember concedes that lost profits, if adequately proven, "could be a consequence of Pember's breach of contract[,]" and we conclude H & C has demonstrated there is an adequate basis in the record to support the trial court's damages award. The court's award was therefore not clearly erroneous.

¶22 In a related argument, Pember contends H & C failed to mitigate its lost-profits damages. The party alleging breach of contract has a duty to mitigate damages, that is, to use reasonable means under the circumstances to avoid or minimize the damages. ***Kuhlman, Inc. v. G. Heileman Brewing Co.***, 83 Wis. 2d 749, 752, 266 N.W.2d 382 (1978). An injured party cannot recover any item of damage that could have been, or was, avoided. ***Id.*** However, the breaching party

has the burden to show that the injured party could have mitigated its damages. ***Id.*** Further, if "the effort, risk, sacrifice or expense which the injured person must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline to incur it, the injured party's failure to act will not bar recovery of full damages." ***Id.***

¶23 Pember argues H & C should have filed a mandamus action seeking to force the city to make repairs, hired a different contractor to repair the three defective sewer laterals serving H & C-owned lots, sought building permits for the lots they still owned, changed their marketing strategy, or varied their plans such that homes to be built on the three properties with defective laterals could be connected instead to adjacent laterals serving neighboring lots.

¶24 We reject Pember's mitigation argument, just as the trial court did. Pember failed to demonstrate at trial that any of the claimed mitigation techniques would have saved one dollar, or that the effort, expense, or risk of such techniques was such that a reasonable person would not have declined to undertake them. Aside from identifying things H & C could have done differently, Pember cites no evidence in the record to support its position.

¶25 Further, we reject Pember's assertion that H & C could have fully mitigated its lost profits by spending $41,444 to repair the three damaged laterals serving its lots. H & C's lost-profits argument was premised on the fact there were seven defective laterals in the subdivision and that the lots did not sell because the looming repair work would be a significant blight to the neighborhood. As the circuit court found, the cost to repair all seven laterals exceeded $150,000. That is a great deal to ask in the way of mitigation—

particularly when H & C's original contract cost for the entire road and utility project was just under $165,000.

¶26 No WIS. STAT. RULE 809.25(1) costs are allowed to either party.

By the Court.—Judgment affirmed in part; reversed in part.

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