COURT OF APPEALS
DECISION
DATED AND RELEASED

March 27, 1997

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.

NOTICE

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

No. 96-1341

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

JULIE A. JAKUBOWSKI AND DONALD MCLEAN,

Plaintiffs-Respondents-Cross Appellants,

v.

ROCK VALLEY BUILDERS,

Defendant-Appellant-Cross Respondent.

APPEAL from a judgment of the circuit court for Rock County: MARK J. FARNUM, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

VERGERONT, J. Rock Valley Builders, Inc. (RVB) appeals from a judgment of the trial court that it breached its contract with Julie and Donald McLean[1] to construct an addition to their home. RVB contends on appeal that

[1] At the time the action was filed, Julie McLean's name was Julie Jakubowski.

the trial court erred in its interpretation of the written contract, and even if it did not, the McLeans agreed to a modification of that contract, which RVB substantially performed.[2] The McLeans cross-appeal, contending that the trial court erroneously concluded that there was no violation of Chapter ATCP 110 of the WISCONSIN ADMINISTRATIVE CODE, which governs home improvement contracts. The McLeans contend they are entitled to double damages and attorney fees for the violations.

We conclude that the trial court correctly interpreted the written contract but that there was a binding modification regarding the second story of the addition such that RVB did not breach its obligations with respect to the second story. We also conclude that RVB violated certain requirements under Chapter ATCP 110 of the WISCONSIN ADMINISTRATIVE CODE. We remand to the trial court for further proceedings regarding the damages due RVB under the contract, and the damages and attorney fees, if any, due the McLeans for the code violations.

BACKGROUND

The McLeans hired RVB to construct a two-story addition to the back of their home. After discussions and proposals between the McLeans and Ronald Maple of RVB, the parties signed a contract providing in pertinent part:

RE: Addition to existing house.
1.Footings & foundation for 20 x 20 ft addition & 4 x 8 ft area added.
2.Build sub floor & 2 x 4 walls upper and lower.
3.Sheathing on exterior walls only.
4.Build for fireplace.
5.Frame roof to match existing.
6.Re roof existing back to valley with globe 3 tab super seal.
7.All labor included.

[2] Rock Valley Builders also challenges the amount the court awarded in *quantum meruit* for its work. However, because of our disposition of the other issues, we do not address this.

The contract did not contain a start or completion date. The contract price for materials and labor was $14,275. The McLeans signed the contract between August 20, 1994 and August 24, 1994, and paid RVB $7,275 at that time. RVB did not give the McLeans a copy of the written contract when it was signed. They received a copy after the work started. RVB prepared drawings prior to the signing of the contract, which showed a first story of 20 feet by 20 feet and a second story of 16 feet by 20 feet. However, these drawings were not attached to the copy of the contract provided the McLeans, and the McLeans did not see the drawings until after they fired RVB.

Work started sometime in the first part of September. In October, during construction of the second story, Donald McLean saw that the ridge (peak of the roof) was centered for a sixteen-foot-wide second story, not for a twenty-foot-wide second story. He told the builder to stop, and Maple came over to discuss the issue. The McLeans told Maple the second story was to be 20 feet by 20 feet with the ridge in the center. Maple told them it would cost an additional $1,200 for RVB to move the ridge. The McLeans said they did not have the money, they were on a budget for the project. The suggestion was made--whether by the Mcleans or by Maple is disputed--that the roof could be extended farther on one side of the ridge than the other so that the second story would be 20 feet wide, with the ridge eight feet from one side and twelve feet from the other. The McLeans acknowledge that they agreed to this construction, but testified that they did so only under pressure, because they could not afford to pay more than the contract price to have the ridge moved.

On or about October 31, 1994, when RVB had finished framing the second story and was roofing it, the McLeans fired RVB. They hired another contractor, Rick Carroll, to reconstruct the second story with a dimension of 20 feet by 20 feet and the ridge in the center. They paid Carroll $5,610.

The McLeans sued RVB, alleging breach of contract for failing to timely complete the work and for mistakes and improper work. They also alleged that the contract violated WIS. ADM. CODE § ATCP 110.05 and related provisions and that, as a result, they were entitled to recover twice the amount of their damages, including costs and reasonable attorney fees under § 100.20(5), STATS. RVB counterclaimed for foreclosure of construction liens, breach of contract, unjust enrichment and *quantum meruit*.

After a trial to the court, the court interpreted the written contract to provide for a second story with a floor dimension of 20 feet by 20 feet; determined that RVB had breached that contract by failing to provide that; and concluded that the McLeans did not waive that breach by allowing construction to continue after discovering the breach. The court found that the damages reasonably and necessarily incurred by the McLeans were $5,937.76, consisting of the cost of reconstruction by Carroll, repair of the McLeans' utility trailer, repair of the subfloor and repair of the wall holes. The court disallowed other items of damages for failure of proof and other reasons. The court concluded that WIS. ADM. CODE § ATCP 110.05(2)(b) did not apply because the contract was not initiated by RVB through solicitation but instead the McLeans contacted RVB. The court denied RVB's counterclaims and discharged its lien rights because it determined RVB had not substantially performed the written contract.

The court issued a second decision after a request for reconsideration in which it concluded that RVB was entitled to recover in *quantum meruit* for the value of material and services provided, which it determined to be $12,875. After offsetting the $7,275 already paid to RVB, the cost of reconstruction, and the damages due the McLeans, the court entered judgment in their favor for $337.76.

INTERPRETATION OF WRITTEN CONTRACT

The first issue is whether the trial court properly construed the written contract. We conclude that it did.

The trial court noted that the written contract described a "20 by 20 foot addition" but was silent on the dimensions of the second story. It also noted that the parties disputed the meaning of the term "frame roof to match existing," with Maple testifying that meant the ridge of the new roof would match the ridge on the existing roof and the McLeans testifying that meant the addition would look like the existing wings on the other three sides of the house, which have the second story walls aligned with the first story walls and the ridge in the center. Maple's interpretation results in a 16 by 20 foot second story and the McLeans' interpretation results in a 20 by 20 foot second story.

Implicit in the trial court's decision is a conclusion that the contract is ambiguous on the dimensions of the second story. Whether a contract is ambiguous in the first instance is a question of law, which we decide independently of the trial court. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. ***Id.*** We conclude the contract language is ambiguous because the interpretations advanced by both parties are reasonable.

While construction of a contract to ascertain the intent of the parties is ordinarily a matter of law for this court, ***Eden Stone Co., Inc. v. Oakfield Stone Co. Inc.***, 166 Wis.2d 105, 116, 479 N.W.2d 557, 562 (Ct. App. 1991), where a contract is ambiguous the question of intent is for the trier of fact. ***Armstrong v. Colletti***, 88 Wis.2d 148, 153, 276 N.W.2d 364, 366 (Ct. App. 1979). We do not set aside the trial court's findings of fact unless they are clearly erroneous. Section 805.17(2), STATS. We conclude that the trial court's construction of the ambiguous written contract, based on the language of the contract and the testimony of the parties, is supported by the record and is not clearly erroneous.

The description of the addition as 20 by 20 feet suggests that both stories will be that dimension, unless something in the contract clearly indicates otherwise. The language that RVB claims indicates otherwise--frame roof to match existing--is cryptic, not clear. Maple's testimony of his discussion with the McLeans prior to signing the contract supports RVB's contention that the parties intended that the second story be 20 by 16 feet. However, testimony of the Mcleans contradicts that testimony and supports their interpretation. It is for the trial judge as finder of fact, not this court, to resolve such conflicts. *See* ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). The trial court implicitly credited the McLeans' testimony on these disputed points rather than that of Maple. In addition, the trial court correctly applied the rule of construing ambiguous language against the drafter. *See* ***Goebel v. First Fed. Savings & Loan Assn.***, 83 Wis.2d 668, 675, 266 N.W.2d 352, 356 (1978).

MODIFICATION OF WRITTEN CONTRACT

RVB argues that even if the trial court correctly interpreted the written contract, the McLeans orally agreed to modify the contract by agreeing

that RVB could leave the ridge in place and extend one side of the roof to create a 20 foot width. The McLeans respond that any such agreement did not waive their right to recover under the written contract because they did not knowingly, voluntarily and intentionally relinquish that right.

We first decide that modification of contract, rather than waiver, is the correct frame of analysis for resolving this dispute. In the context of contract law, the concept of waiver is properly used to determine whether conditions to a party's obligations under a contract have been eliminated by the voluntary words or conduct of that party alone. *See* CORBIN ON CONTRACTS § 752 at 478-82 (1960).[3] In the context of building contracts, examples of conditions that may, under appropriate circumstances, be considered waived by the owner are conditions of timeliness and of the owner's power to reject work not meeting specifications. *See* CORBIN ON CONTRACTS § 756; *see also* ***Stevens Construction Corp. v. Carolina Corp.***, 63 Wis.2d 342, 356-57, 217 N.W.2d 291, 299 (1974).

However, when the allegation is that both parties have agreed to modify certain terms of the original contract, waiver is not the applicable concept. CORBIN ON CONTRACTS, § 752 at 481-82. Rather, the issue is whether there was a valid modification of the contract. ***Id.*** A written contract may be modified by a subsequent oral agreement, and that oral modification is binding if it satisfies all the requirements of a valid contract, including assent. ***Kohlenberg v. American Plumbing Supply Co.***, 82 Wis.2d 384, 393, 263 N.W.2d 496, 500 (1978). New consideration is not required to support a modification of an executory contract, such as when the construction provided for in the initial contract is not yet completed. *See* ***Everlite Mfg. Co. v. Grand Valley Machine & Tool Co.***, 44 Wis.2d 404, 408, 171 N.W.2d 188, 190 (1969).

The determination whether parties to a written contract have entered into a subsequent oral agreement to modify the contract is ordinarily a factual determination. ***Kohlenberg***, 82 Wis.2d at 393, 263 N.W.2d at 500. There is no dispute in this case that the McLeans agreed with RVB to have one side of the roof extended farther than the other side to create a second story of 20 x 20

[3] ***Hanz Trucking, Inc. v. Harris Brothers Co.***, 29 Wis.2d 254, 268, 138 N.W.2d 238, 246 (1965), on which the McLeans rely for their waiver argument, illustrates this point. There the issue was whether the lessor of a truck, who had billed the lessee for actual mileage rather than minimum monthly mileage as the contract provided, could later recover the minimum monthly not previously billed.

feet. However, whether that assent was sufficient to create a binding modification requires an analysis of the reasons for the McLeans' assent. Cast in terms of modification of contract rather than waiver, the McLeans' argument is that they could not possibly have foreseen what the finished product would look like, and they did not voluntarily agree because they could not afford to pay RVB more money to move the ridge.

Although the trial court framed the issue in terms of waiver rather than modification of contract, it did make factual findings pertinent to the validity of the McLeans' assent. After referring to some of the testimony on this issue, the trial court stated:

> While McLeans may have been aware of the mis-location of the ridge or peak during construction, the court believes they could not have readily visualized and appreciated its impact on the end product in order to make an intelligent decision or waiver until after completion. The conduct of McLeans was greatly influenced by financial considerations and limited perceptions so as not to be completely free and unfettered.

We have searched the record for testimony to support the trial court's finding that the McLeans were unable to visualize the results of their agreement to extend one side of the roof. We can find only this testimony from Donald McLean:

> QAnd I believe in response to the judge's questions you said you had a problem aesthetically with the way it was eventually built once the roof line was dragged out.[4]
>
> AI didn't like it.

[4] We have been unable to identify the prior question of the court this question refers to.

We conclude that this testimony is insufficient, as a matter of law, to void the modification. A mistake by one party--that is, a misconception about the meaning or implication of something, *see* ***Security Pac. Nat'l Bank v. Ginkowski***, 140 Wis.2d 332, 337, 410 N.W.2d 589, 592 (Ct. App. 1987)--is grounds for rescission of a contract if there is fraud on the part of the other party. ***Sorce v. Rinehart***, 69 Wis.2d 631, 638, 230 N.W.2d 645, 649 (1975). Donald McLean's testimony supports a finding that the McLeans did not like the end product from an aesthetic standpoint, but it does not support a finding that they were mistaken about what they were agreeing to. Even if it did, there is no evidence that RVB misled the McLeans about how the end product would look and there is no evidence of fraud by RVB.[5]

The court's second finding--that the McLeans were influenced by financial considerations--is supported by the record. They testified they felt pressured into agreeing to leaving the ridge where it was and extending the roof on one side because they could not afford the additional money that Maple said he would charge to move the ridge, and Maple knew they could not afford it. The issue here is whether these facts are sufficient to support the legal conclusion that their agreement did not create a binding modification of the contract.

Economic duress applied to one party by the other to a contract is a basis for voiding a contract. ***Mendelson v. Blatz Brewing Co.***, 9 Wis.2d 487, 494, 101 N.W.2d 805, 809 (1960). The elements for proving economic duress as a tort were defined in ***Wurtz v. Fleischman***, 97 Wis.2d 100, 293 N.W.2d 155 (1980). We have since followed ***Wurtz*** when economic duress is asserted as a defense to a contract action. *See* ***Pope v. Ziegler***, 127 Wis.2d 56, 60, 377 N.W.2d 201, 203 (Ct. App. 1985); ***Stillwell v. Linda***, 110 Wis.2d 388, 391, 329 N.W.2d 257, 258 (Ct. App. 1982). The elements identified in ***Wurtz*** are:

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[5] In ***Erickson v. Gundersen***, 183 Wis.2d 106, 119, 515 N.W.2d 293, 299 (Ct. App. 1994), we recognized that RESTATEMENT (SECOND) OF CONTRACTS § 153 (1981) provided additional grounds for rescission based on a unilateral mistake: "if the mistake leads to an unconscionable result" or (b) "the other party had reason to know of the mistake or caused the mistake." However, we did not adopt that statement of the law in ***Erickson*** because it was unnecessary to our decision. In this case, even were we to adopt the RESTATEMENT standard, we would nevertheless conclude the McLeans are not entitled to void the modified contract based on mistake because the record does not support any of the RESTATEMENT bases for rescission.

> 1. The party alleging economic duress must show that he has been the victim of a wrongful or unlawful act or threat, and
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> 2. Such act or threat must be one which deprives the victim of his unfettered will.
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> As a direct result of these elements, the party threatened must be compelled to make a disproportionate exchange of values or to give up something for nothing. If the payment or exchange is made with the hope of obtaining a gain, there is not duress; it must be made solely for the purpose of protecting the victim's business or property interests. Finally, the party threatened must have no adequate legal remedy. (Citations omitted.)

Wurtz, 97 Wis.2d at 109-10, 293 N.W.2d at 160. Without deciding whether the McLeans have established any other element, we conclude they have failed to establish that they had no adequate legal remedy as an alternative to agreeing to the extension of one side of the roof.[6]

Donald McLean testified that when Maple refused "to work with" him on the ridge dispute, he started looking for legal advice and he and Julie watched the builders complete the second story with the off-center ridge and extended roof on one side while they were getting legal advice. Julie McLean acknowledged that after agreeing to that construction, over a period of seven

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[6] We note that pre-***Wurtz*** cases recognizing economic duress as a contract defense concluded no adequate remedy was an element of the defense. *See* ***Minneapolis, St. Paul & Sault Ste. Marie Railway Company v. Railroad Commission of Wisconsin***, 183 Wis. 47, 197 N.W. 352 (1924) (in a contract defense, "duress may sometimes be implied when payment is made or an act performed to prevent great property loss or heavy penalties when there seems no adequate remedy except to submit to an unjust or illegal demand and then seek redress in the courts").

We also note, that although the determination whether economic duress is proved is ordinarily one for the finder of fact, ***Wurtz***, 97 Wis.2d at 108, 293 N.W.2d at 159, since the pertinent facts are undisputed we are presented with a question of law. *See* ***Wassenaar v. Panos***, 111 Wis.2d 524, 525, 331 N.W.2d 357, 361 (1983).

weeks they watched RVB proceed to build the second story that way without stopping RVB. There is no evidence that suggests that they would have suffered financial loss that could not have been compensated for in damages if they had sought legal advice about enforcing their rights under the written contract without first agreeing to an off-centered ridge and extension of the roof. We find the record devoid of any evidence to support a finding that they did not have an adequate legal remedy as an alternative to agreeing to the off-centered ridge and extension of one side of the roof.

Because we conclude that the McLeans agreed to modify the written contract by extending the roof on one side and leaving the ridge eight feet from the other side, we also conclude that RVB did not breach its contract with the McLeans by constructing the second story in that manner. Since the trial court held that it did, it determined what was owing RVB based on *quantum meruit* rather than under the contract as modified. We are unable to determine what amount the McLeans owe RVB in view of our holding that it did not breach the contract with regard to the second story, and we remand to the trial court for that determination.[7]

[7] We are unable to tell from the trial court's opinion whether it determined that RVB did not breach the contract in the other ways claimed by the McLeans; or whether it did not decide that because it found no damages from other breaches; or whether it did not decide that because it was unnecessary once it found a substantial breach with respect to the second story. We also are unable to determine the precise stage of construction on October 31, 1994, and whether that affects the amount due RVB under the contract.

VIOLATION OF WIS. ADM. CODE § ATCP 110

The Wisconsin Department of Agriculture, Trade and Consumer Protection, pursuant to its authority under § 100.20(2), STATS.,[8] has adopted regulations governing home improvement trade practices. WIS. ADM. CODE § ATCP 110. WISCONSIN ADMINISTRATIVE CODE § ATCP 110.05 imposes certain requirements on home improvement contracts between owners of residential property and entities engaged in the business of making or selling home improvements. *See* WIS. ADM. CODE § ATCP 110.01(1)(a), (4) and (5). "Home improvements" include additions to residential property. WIS. ADM. CODE § ATCP 110.01(2). Persons who suffer a monetary loss because of a violation of WIS. ADM. CODE § ATCP 110 may sue the violator directly under § 100.20(5)[9] and recover twice the amount of the loss, together with costs and reasonable attorney fees. *See* Note WIS. ADM. CODE § ATCP 110.

WISCONSIN ADMINISTRATIVE CODE § ATCP 110.05(1) provides:

> **Home improvement contract requirements**. (1) The following home improvement contracts and all changes in the terms and conditions thereof, shall be in writing:

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[8] Section 100.20(2), STATS., provides:

> The department, after public hearing, may issue general orders forbidding methods of competition in business or trade practices in business which are determined by the department to be unfair. The department, after public hearing, may issue general orders prescribing methods of competition in business or trade practices in business which are determined by the department to be fair.

[9] Section 100.20(5), STATS., provides:

> Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

> (a) Contracts requiring any payment of money or other consideration by the buyer prior to completion of the seller's obligation under the contract.
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> (b) Contracts which are initiated by the seller through face-to-face solicitation away from the regular place of business of the seller, mail or telephone solicitation away from the regular place of business of the seller, mail or telephone solicitation, or handbills or circulars delivered or left at places of residence.

The trial court concluded that WIS. ADM. CODE § ATCP 110.05 did not apply to RVB because RVB did not initiate the contract as provided in WIS. ADM. CODE § 110.05(1)(b). Interpretation of a regulation is a question of law, which we decide independently of the trial court. ***Moonlight v. Boyce***, 125 Wis.2d 298, 303, 372 N.W.2d 479, 483 (Ct. App. 1985). The plain language of the regulation covers contracts described in subsec. (a) and contracts described in subsec. (b). On appeal, RVB offers no argument supporting the trial court's interpretation of the regulation but does argue that the contract at issue here is not governed by the regulations because the addition was for Julie McLean's child care business and therefore the property is not residential. We do not agree.

Julie McLean testified that the first story of the addition was to provide more room for the children she cared for in her home and the second story was to give her family more space. It is undisputed that the building to which the addition was added was a "structure used, in whole or in part, as a home or place of residence ..." and is therefore residential property. WIS. ADM. CODE § ATCP 110.01(3). Home improvement means "... the remodeling, altering, repairing, painting or modernizing of residential or non-commercial property, or the making of additions thereto...." WIS. ADM. CODE § ATCP 110.01(2). There is no hint in the language of the regulation that the use of an addition to residential property for income producing purposes as well as residential purposes takes it out of the definition of home improvement. We conclude that the contract between RVB and the McLeans is a home improvement contract and it is governed by WIS. ADM. CODE § ATCP 110.05.

The McLeans argue that these violations of the regulations occurred: (1) The contract did not "clearly, accurately and legibly set forth all the terms and conditions of the contract," as required by WIS. ADM. CODE § ATCP 110.05(2)(b)[10] because it did not clearly state the dimensions of the

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[10] WISCONSIN ADMINISTRATIVE CODE § ATCP 110.05(2) provides:

> If a written home improvement contract is required under sub. (1), or if a written home improvement contract is prepared using the seller's pre-printed contract form, the written contract shall be signed by all parties and shall clearly, accurately and legibly set forth all terms and conditions of the contract, including:
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> (a) The name and address of the seller, including the name and address of the sales representative or agent who solicited or negotiated the contract for the seller.
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> (b) a description of the work to be done and the principal products and materials to be used or installed in performance of the contract. The description shall include, where applicable, the name, make, size, capacity, model and model year of principal products or fixtures to be installed, and the type, grade, quality, size or quantity of principal building or construction materials to be used. Where specific representations are made that certain types of products or materials will be used, or the buyer has specified that certain types of products or materials are to be used, a description of such products or materials shall be clearly set forth in the contract.
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> (c) The total price or other consideration to be paid by the buyer, including all finance charges. If the contract is one for time and materials the hourly rate for labor and all other terms and conditions of the contract affecting price shall be clearly stated.
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> (d) The dates or time period on or within which the work is to begin and be completed by the seller.
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> (e) A description of any mortgage or security interest to be taken in connection with the financing or sale of the home improvement.
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> (f) A statement of any guarantee or warranty with respect to any

second story; (2) the contract did not state the dates or time period on or within which the work was to begin and be completed as required by WIS. ADM. CODE § ATCP 110.05(2)(d);[11] and (3) RVB did not provide the McLeans with a copy of the written contract before it began work or received any payment as required by WIS. ADM. CODE § ATCP 110.05(3).[12] Because of the trial court's interpretation of WIS. ADM. CODE § ATCP 110.05(1), it did not determine whether these requirements were violated. RVB does not argue on appeal that they complied with these requirements. Because the pertinent facts are not disputed, we are able to determine as a matter of law whether these three requirements were violated, and we conclude they were.

The dimensions of the first and the second story of the addition were the subject of discussions and proposals prior to signing the written contract and were, without doubt, significant terms of the project which should have been clearly and accurately stated in the contract. This was not done, as our discussion on the proper construction of the written contract demonstrates. If the drawing showing a 16 by 20 foot dimension to the second story were considered part of the written contract, that arguably would meet the requirements of WIS. ADM. CODE § ATCP 110.05(2)(b) on this point. However, that drawing was not described in the written contract as required by WIS. ADM. CODE § ATCP 110.05(2)(g), and was not attached to the copy of the written contract provided to the McLeans. The copy of the written contract was

(..continued)

> products, materials, labor or services made by the seller or which are required to be furnished to the buyer under s. ATCP 110.04(1).
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> (g) A description or identification of any other document which is to be incorporated in or form part of the contract.

[11] One significance of this requirement is that the seller is required under WIS. ADM. CODE § ATCP 110.02(7)(c) to give the buyer timely notice of an impending delay in the contract performance if performance will be delayed beyond the date specified in the contract. If the seller fails to give this notice or obtain agreement to a new deadline, the buyer has certain remedies under the regulations, in addition to other remedies. *See* WIS. ADM. CODE § ATCP 110.07.

[12] WISCONSIN ADMINISTRATION CODE § ATCP 110.05(3) provides:

> Before the seller begins work or receives any payment under a written home improvement contract, the seller shall provide the buyer with a copy of the contract.

provided to the McLeans after the payment of $7,275 was received by RVB and after work started. Finally, the written contract did not contain start and completion dates.

In light of our conclusion that the written contract was modified, we also hold that WIS. ADM. CODE § ATCP 110.05(1) was violated because the terms of the modified contract were not in writing.

We agree with RVB that the McLeans are entitled to double damages and attorney fees under § 100.20(5), STATS., only if they suffered pecuniary loss because of a violation of WIS. ADM. CODE § ATCP 110.05. We also agree with RVB that, because the trial court found that the McLeans had not provided sufficient proof that they lost compensation from Julie McLean's child care business because of the delay in completing construction, that loss does not constitute a "pecuniary loss because of a violation" of the code, even if it otherwise would. However, we do not agree with RVB that we should review the record to make our own determination whether the damages to the subflooring were caused by a violation of the code. Because each of the code violations requires a determination whether that violation caused a pecuniary loss, and because the trial court did not consider this issue for any violation, we are persuaded that the proper course is a remand to the trial court.

On remand, the court may conduct such further proceedings as it considers appropriate to determine whether any of the violations of the code we have identified caused the McLeans pecuniary loss, and if so, the amount of that loss and the amount of reasonable attorney fees incurred to establish the violation(s) and loss. Any attorney fees recoverable by the McLeans do not include those incurred solely in the defense of RVB's counterclaims. *See* ***Boyce***, 125 Wis.2d at 307, 372 N.W.2d at 485 (Ct. App. 1985).

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

Not recommended for publication in the official reports.