COURT OF APPEALS
DECISION
DATED AND FILED

July 27, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-2880

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

DENNIS DEMARCE AND PENELOPE DEMARCE,

PLAINTIFFS-RESPONDENTS,

V.

FRANCIS E. DIESING,

DEFENDANT-APPELLANT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Pierce County: ROBERT W. WING, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Cane, C.J., Myse, P.J., and Hoover, J.

PER CURIAM. Francis Diesing appeals a judgment in the amount of $30,000 in damages and $6,600 in attorney fees for damage to his tenant's

property due to negligent roof repair on the farmhouse Diesing leased to Dennis and Penelope DeMarce. Diesing argues that he should be dismissed as defendant because the DeMarces failed to follow § 803.10, STATS., in order to substitute a proper party within ninety days after the suggestion of Diesing's death. We reject this argument and affirm the trial court's denial of his motion to dismiss.

Diesing further argues that the jury's verdict apportioning 35% liability to the DeMarces and only 5% to him bars the DeMarces' recovery under § 895.045(1), STATS. We agree that the DeMarces may not recover tort damages because their negligence exceeds his. Therefore, we reverse the award of tort damages.

Finally, Diesing argues that the award of double damages and attorney fees under § 100.20(5), STATS., for an alleged violation of WIS. ADM. CODE § ATCP 134.07 is inappropriate if the DeMarces were unable to prevail on the underlying claim. We disagree with Diesing's legal argument. Nonetheless, because the verdict was fatally defective, we conclude that it prevented the real issue in controversy regarding the code violation from being tried. Therefore, we exercise our discretionary power and reverse the judgment for double damages, costs and attorney fees. Accordingly, we affirm in part, reverse in part, and remand for a new trial upon the alleged § ATCP 134.07 violation.

In 1982, Diesing leased a farmhouse to the DeMarces. In June 1996, the DeMarces noticed a leak in the roof, apparently caused by some missing shingles that had detached in a prior storm. The DeMarces promptly reported the leak to Diesing, who hired a contractor, Rich Pfingsten, to repair the roof. During the course of repairs, Pfingsten discovered the extent of the damage was more

severe than expected and removed a portion of the roof, exposing the upstairs to the elements.

Pfingsten's repairs were extensively delayed and, in fact, he never completed them. The DeMarces, aware of the partially removed roof, continued to store many of their personal belongings in the upper floor of the house despite the substantial risk that the items would be damaged from the exposure to inclement weather. The DeMarces' personal property was eventually damaged by the weather.

In January 1997, the DeMarces filed this suit for negligence and double damages pursuant to § 100.20(5), STATS., for violation of WIS. ADM. CODE § ATCP 134.07. On April 13, 1998, during the pendency of this action, Francis Diesing died.

The jury returned a verdict finding $15,000 in property damage and apportioned causal negligence as follows: Pfingsten 60%, Dennis DeMarce 35% and Diesing 5%.[1] The court found that, as a matter of law, Diesing made promises to repair, specifying the date or time period. The jury then answered "yes" as to whether Diesing's failure to specify a date for the improvements to be completed was a cause of monetary loss suffered by the DeMarces. The jury was not asked, however, to state the amount of property damage caused by the failure to provide a completion date.

Following the trial, Diesing moved for judgment of dismissal on the verdict since the DeMarces' negligence exceeded his. The court denied Diesing's

[1] Although Dennis DeMarce also claimed personal injury, the jury found no causal negligence on behalf of Diesing.

motion and pursuant to § 100.20(5), STATS., doubled the jury award and entered judgment for $30,000 and attorney fees of $6,600.

Diesing moved to void the judgment because it was rendered after death contrary to § 803.10(5), STATS., or, alternatively, to void the judgment because a proper party was not substituted for Diesing within ninety days of notice of his death under § 803.10(1). On September 23, 1998, the court denied the motion, and Diesing filed this appeal to both the judgment and denial of the post-judgment motion.

Diesing argues that the claim against him should be dismissed because the DeMarces failed to substitute a proper defendant within ninety days of suggestion of Diesing's death as required by § 803.10(1)(a), STATS.[2] We disagree. Our review of statutory interpretation is de novo. ***Wick v. Waterman***, 143 Wis.2d 676, 678, 421 N.W.2d 872, 872-73 (Ct. App. 1988). Section 803.10(1)(a) reads:

> If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successor or representatives of the deceased party and … [u]nless the motion for substitution is made not later than 90 days after the death is suggested on the record by service of a statement of the facts of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Section 803.10(1), STATS., unambiguously requires: (1) a motion for substitution of the party and (2) service of the statement of facts of death. This statute has been interpreted to require two conditions to be satisfied before the

[2] The parties do not raise the issue of the survival of the cause of action. *See* 1 AM.JUR.2D §§ 52, 58, and 62, *Abatement, Survival and Revival*. Therefore we do not discuss it. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992).

ninety-day time limit is triggered. In ***Wheeler v. General Tire & Rubber Co***., 142 Wis.2d 798, 419 N.W.2d 331 (Ct. App. 1987), we held that the ninety-day limit in § 803.10(1)(a), STATS., is not triggered unless the death of the party is formally suggested on the record, even if all parties are aware that a party has died. ***Id***. at 808, 419 N.W.2d at 335. In that case, a letter to the court of appeals informing of a party's death was an insufficient suggestion of death within the meaning of § 803.10(1)(a).

In the second case, ***Wick***, we held that in addition to a formal suggestion of death on the record, to trigger the ninety-day limit of § 803.10(a) STATS., the suggestion must also "identify a proper party to substitute for a deceased defendant …." ***Id***. at 679, 421 N.W.2d at 873. In ***Wick***, the failure to identify a proper substitute defendant led to the absurd result of the plaintiff "having himself appointed as the representative of the estate of the very person he had sued, no other person having been appointed or having sought the appointment." ***Id***. The rationale behind ***Wick*** is to prevent the placing of the tactical burden on the plaintiff "of locating the representative of the estate within 90 days." ***Id***. (quoting ***Rende v. Kay***, 415 F.2d 983, 986 (D.C. Cir. 1969)).

It is undisputed that there was neither a motion nor an order for substitution of the proper party. It is also undisputed that there was not service of a statement of facts to suggest death on the record. All of the parties, and the court, believe that Francis has died. Rick Diesing, one of Diesing's two children, testified that since his father's death, he had taken over his record keeping. However, because there was no motion or no service of the statement of facts, the court correctly refused to dismiss the action.

Next, Diesing argues that the jury verdict, which apportioned 35% of the negligence to Dennis DeMarce and only 5% to Diesing, bars the DeMarces from any recovery under § 895.045, STATS. We agree. Section 895.045(1) reads: "[c]ontributory negligence does not bar recovery in an action by any person or the person's legal representative to recover damages resulting in … injury to … property, if that negligence was not greater than the negligence of the person against whom recovery is sought …." This rule does not apply, however, if "2 or more parties act in accordance with a common scheme or plan …." Section 895.045(2), STATS. The application of statutory language to a set of found facts is a question of law we review de novo. ***Wick***, 143 Wis.2d at 673, 421 N.W.2d at 872-03.

Here, the record fails to demonstrate that the court or the jury found that Diesing acted according to a common scheme or plan with Pfingsten. To the contrary, the record indicates that Pfingsten thwarted Diesing's attempts to have the roof repaired. Because the DeMarces' negligence exceeded Diesing's, the DeMarces may not recover negligence damages from him.[3]

Next, Diesing argues that the DeMarces' failure to prevail on the negligence claim precludes the application of the double damage sanctions pursuant to § 100.20(5), STATS.[4] We conclude that a plaintiff is not required to

[3] The record indicates that neither party raised the issue of the landlord's non-delagable duty to repair. *See* ***Wertheimer v. Saunders***, 95 Wis. 573, 582-83, 70 N.W.2d 824, 827 (1897). Therefore, we do not address the issue.

Similarly, they do not address the appropriate remedy for breach of duty to repair. *See* § 704.07(4), STATS.; ***Logterman v. Dawson***, 190 Wis.2d 90, 109, 526 N.W.2d 768, 774 (Ct. App. 1994); 2 Law of Damages in Wisconsin §§ 22.16 to 22.19.

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

Methods of competition and trade practices.

(continued)

prevail on a negligence claim in order to be entitled to recover under § 100.20(5), STATS., "twice the … pecuniary loss" based upon a code violation. Nonetheless, we reverse the trial court's award of double damages because the record reveals that the real controversy has not been tried.

A landlord's duty to repair derives from a number of different sources. While a landlord-tenant relationship is contractual, "in addition to a breach of contract action, a tenant has a separate negligence action when the landlord has contracted to make repairs and the landlord's failure to exercise ordinary care in making repairs is a cause of the tenant's personal injury or property damage." ***Jacobs v. Karls***, 178 Wis.2d 268, 275, 504 N.W.2d 353, 356 (Ct. App.1993). ***Jacobs*** further explains: "That the lease incorporates and redistributes the common law duty of ordinary care does not establish the lease as a source of that duty." ***Id***. at 277, 504 N.W.2d at 356.

Other sources of landlords' duties can be found in ch. 704, STATS., and administrative regulations in WIS. ADM. CODE § ATCP 134. These sections create rights that tenants may enforce independently of a common law negligence or breach of contract action. The administrative regulations found in § ACTP 134 govern residential tenancies and were adopted under the authority of § 100.20, STATS. *See* The Law of Damages in Wisconsin, Contracts for Leasehold Interests in Real Property § 22.21 at 22-10 (2d ed. 1998).

….
(5) 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.

Section 100.20, STATS., governs trade practices and provides for a recovery of twice the amount of "pecuniary loss, together with costs, including a reasonable attorney's fee" because of a violation of residential rental practices enacted in ch. 134. "[T]he public policy behind § 100.20(5), STATS., is to provide an incentive for tenants to pursue their rights and act as 'private attorney[s] general.'" ***Pierce v. Norwick***, 202 Wis.2d 587, 594, 550 N.W.2d 451, 454 (Ct. App. 1996).

WIS. ADM. CODE § ATCP 134.07, the specific section at issue, provides in part:

> Promises to repair. (1) DATE OF COMPLETION. Every promise or representation made by a landlord to a tenant or prospective tenant to the effect that the dwelling unit or any other portion of the premises, including furnishings or facilities, will be cleaned, repaired or otherwise improved by the landlord shall specify the date or time period on or within which the cleaning, repairs or improvements are to be completed.
>
> ….
>
> (3) PERFORMANCE; UNAVOIDABLE DELAYS. No landlord shall fail to complete the promised cleaning, repairs or improvements on the date or within the time period represented under sub. (1), unless the delay is for reason of labor stoppage, unavailability of supplies or materials, unavoidable casualties, or other causes beyond the landlord's control. The landlord shall give timely notice to the tenant of reasons beyond the landlord's control for any delay in performance, and stating when the cleaning, repairs or improvements will be completed.

Under subsec. (1), a landlord is required to specify a date or time period within which the improvements are to be completed. Pursuant to subsec. (3), the landlord must complete the promised repairs within the time represented unless the delay is due to enumerated reasons or other causes beyond his control.

Here, the verdict asked only two questions relating to the alleged code violation:

> 12. Did the landlord make promises of repair specifying the date or time period on or within which the cleaning, repairs or improvements are to be completed?

This question was answered "yes" by the court as a matter of law. The next question asked:

> 13. If you answered question no. 12 "Yes", then answer the following question: Was the failure of Francis Diesing to specify a date by which improvements were to be completed a cause of the monetary loss, if any, suffered by the plaintiffs?

The jury answered this question "yes."

The jury verdict on the DeMarces' violation of residential rental practices regulations claim is fatally defective. First, the verdict is internally inconsistent. While question 12, answered by the court in the affirmative, asked whether Diesing specified a date, question 13 assumes that he did not. We cannot speculate how the jury resolved this inconsistency. Second, the verdict did not ask the jury to specify what "pecuniary" or "monetary" loss was caused by Diesing's failure to specify a date.

Third, the verdict did not inquire whether Diesing failed to complete the promised cleaning, repairs or improvements on the date or within the time period represented; nor did it ask whether the delay was for reason of labor stoppage, unavailability of supplies or materials, unavoidable casualties, or other causes beyond the landlord's control. Fourth, the verdict failed to ask whether the DeMarces were provided timely notice to the tenant of reasons beyond the

landlord's control for any delay in performance, and when the cleaning, repairs or improvements would be completed. Therefore, the verdict is incomplete with respect to a claim based upon a violation of § ATCP 134.07.

Because the verdict was incomplete, it failed to support a claim for a violation of § ATCP 134.07. As a result, the trial court erred when it applied § 100.20(5), STATS., and concluded that the Demarces proved that they suffered a pecuniary loss because of a violation of § ATCP 134.07. We also conclude that the trial court's error was compounded when it used the negligence damage amount to determine the "pecuniary loss" under § 100.20. The damages flowing from negligence are not necessarily identical to damages flowing from a code violation.

Ordinarily, an objection is required to preserve a claim of error in the verdict. Section 805.13, STATS. Nonetheless, in absence of an objection, we may exercise our discretionary power of reversal when we determine that the real controversy has not been tried. Section 752.35, STATS.[5]

> This broad statutory authority provides the court of appeals with power to achieve justice in its discretion in the individual case. The first category of cases arises when the real controversy has not been fully tried. Under this first

[5] Section 752.35, STATS., provides:

> In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

> category, it is unnecessary for an appellate court to first conclude that the outcome would be different on retrial.

Vollmer v. Luety, 156 Wis.2d 1, 19, 456 N.W.2d 797, 805 (1990). Here, the defective verdict prevented the real controversy relating to the code violation from being tried.

In summary, we conclude that the trial court correctly denied the motion to dismiss under § 803.10, STATS. Because the DeMarces' negligence exceeded Diesing's, and because there was no finding of a common scheme or plan under § 895.045(2), STATS., we reverse the award of negligence damages. Finally, because the defective verdict prevented the real issue in controversy regarding the code violation from being tried, we reverse the judgment for double damages, costs and attorney fees. We remand the cause for a new trial based upon the alleged § ATCP 134.07 violation.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded with directions. No costs to either party.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.