COURT OF APPEALS
DECISION
DATED AND FILED

September 16, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

No. 97-2192

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

CHARLES G. VOGEL AND KATHLEEN A. VOGEL,

PLAINTIFFS,

V.

GILBERT RUSSO, AN INDIVIDUAL D/B/A RUSSO BUILDERS, AND MILWAUKEE MUTUAL INSURANCE COMPANY,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-RESPONDENTS,

V.

WEST BEND MUTUAL INSURANCE COMPANY,

THIRD-PARTY DEFENDANT-APPELLANT,

INTERSTATE HEATING COMPANY, BETTY LIMBACH, F/D/B/A LIMBACH CONSTRUCTION COMPANY AND ABC INSURANCE COMPANY,

THIRD-PARTY DEFENDANTS.

APPEAL from a judgment of the circuit court for Ozaukee County: JOSEPH D. McCORMACK, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. West Bend Mutual Insurance Company appeals from a judgment requiring it to pay a portion of the damages sustained by Charles G. and Kathleen A. Vogel caused by defective construction in the Vogels' home. West Bend argues that it provides no coverage for the defective work product of its insured, Limbach Construction Company, and therefore, West Bend is not required to contribute to the cost of repair of such work as embodied in the judgment against the general contractor, Gilbert Russo, d/b/a Russo Builders. We affirm the trial court's ruling that West Bend is responsible for 60% of the amount the jury determined to be the home's diminution in value.

The Vogels contracted with Russo Builders for the construction of a two-story single-family home. Limbach was the subcontractor for masonry work which included an exterior brick veneer, chimneys, fireplaces, interior brick, brick pavers, concrete block basement walls, and concrete floor in the basement and garage. The home, upon completion, was fraught with defects and construction errors. The Vogels sued Russo Builders for breach of contract. Russo Builders brought its subcontractors and their insurers into the action alleging negligence in their work.

The jury determined that because of faulty construction the diminution in value of the Vogel home was $320,000. The jury also determined that the cost of repair of the home was $320,000. Russo Builders, Limbach and another subcontractor, Interstate Heating Company, were all found to be causally negligent in the construction of the home. Liability was apportioned 30%, 60%

and 10% respectively. The costs of repair were determined as follows: repair masonry work of Limbach, $235,100; repair interior water damage relative to work of Interstate Heating, $10,700; repair interior water damage relative to work of Limbach, $3500; repair other items not related to work of Limbach, $70,700.

West Bend points out that no coverage exists to repair or replace Limbach's poor work product.[1] It concedes liability for 60% of the damage to the interior of the house caused by Limbach's work, a net sum of $2100. Judgment was based on the jury's determination of the diminution in value. Judgment was entered against West Bend for $192,000, which is 60% of the diminution of value damages of $320,000.

West Bend first argues that a diminution of value measure of damages does not gauge "property damage" as defined in the policy because that definition requires physical injury to tangible property. However, the diminution in value is merely a measurement of damages and does not describe the character of the damages sustained. Thus, the cases West Bend cites as classifying diminution of value as "intangible damages" are inapposite. *See* ***Aetna Life & Cas. v. Patrick Indus., Inc.***, 645 N.E.2d 656, 660 (Ind. Ct. App. 1995); ***Kartridg Pak Co. v. Travelers Indem. Co.***, 425 N.W.2d 687, 689-90 (Iowa Ct. App. 1988).

The issue here is the trial court's choice between the two appropriate measures of damages for defects in construction.

[1] The policy contains a business risk exclusion. The risk intended to be insured is the possibility that the work of the insured will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. *See* ***Bulen v. West Bend Mut. Ins. Co.***, 125 Wis.2d 259, 264-65, 371 N.W.2d 392, 394 (Ct. App. 1985).

> Generally, the measure of damages is the cost of correcting the defect or completing the omission and with this money, the aggrieved party can specifically correct the defects and supply the omissions. This measure of damages is practical and attains the desired result only when the correction or completion does not involve unreasonable destruction of the work done so that the cost of corrections is not materially disproportionate to the value of the corrections. If reconstruction and completion in accordance with the contract involves unreasonable economic waste, then the rule as to those defects at least is the difference between the value the building would have had if properly constructed and the value that the building does have as constructed.

W.G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc., 62 Wis.2d 220, 225-26, 214 N.W.2d 413, 416 (1974).

The trial court is charged with determining whether the facts justify the application of the rule of damages permitting recovery for the reasonable cost of repairs, the diminished value rule, or both. *See* ***id***. at 227, 214 N.W.2d at 417. With the jury's answers on the damage questions, the trial court was positioned to determine the appropriate measure of damages. *See* ***Jacob v. West Bend Mut. Ins. Co.***, 203 Wis.2d 524, 543, 553 N.W.2d 800, 807 (Ct. App. 1996).

Which measurement of damages should be applied depends upon the nature and magnitude of the defects. *See* ***Plante v. Jacobs***, 10 Wis.2d 567, 573, 103 N.W.2d 296, 299 (1960). The trial court determined that repair was economic waste.[2] That made the diminution in value the appropriate measurement of damages. On this record, the trial court's ruling was correct.[3]

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[2] The trial court reasoned:

> Determining whether to apply cost of repair or diminished value, the court is mindful that based upon the evidence adduced at trial, the thought of repairing the defects in the Vogel home borders on folly. From the testimony adduced at trial, the plaintiffs' expert indicated that at present time the building is a "tear-down" that only has a value as a lot. This testimony was

(continued)

West Bend focuses on the jury's determination that it would cost $235,100 to repair Limbach's work. It claims that it cannot be made to pay for that under the business risk exclusion in the policy. *See* note 1. However, once it is properly determined that the measure of damages is the diminution in value, the determination of costs of repairs drops out of the case. Russo Builders was liable for damages measured by the diminution in value. Limbach's contribution share is based on what Russo Builders pays.[4] *See* ***Kafka v. Pope***, 194 Wis.2d 234, 241, 533 N.W.2d 491, 494 (1995) (contribution not dependent on source of damages).

The West Bend policy covers property damage.[5] It defines property damage as physical injury to tangible personal property or loss of use of tangible property which has not been physically injured. There is no dispute that there was

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> never refuted. Indeed common sense, which apparently prevailed in the jury room, would dictate that no person of sound mind would purchase this home even if all the required repairs were made. But even absent a common sense application, it is clear from the record that the costs of repairs would be grossly disproportionate to any results obtained.

[3] The costs of repairs exceeded the original contract building price of $307,245. A realtor testified that the Vogels would not be able to sell the house in its unrepaired condition. If the home had not had any significant problems requiring disclosure on a condition report, the home could sell for $725,000 to $750,000. However, the realtor explained that potential buyers in that price range would not want to deal with any potential problems. The realtor opined that the property could be sold for the lot in the $300,000 to $320,000 range and the house would be a "tear-down."

[4] West Bend argues that it is unfair to make it responsible for 60% of the total figure which encompasses diminution in value attributable to other subcontractors. It also suggests that the judgment conflicts with the trial court's "Order for Judgment: Third-Party Claim" which declared that Russo Builders could recover from Betty Limbach, the surviving spouse of Michael Limbach, to the extent of property held by her. We deem the issues inadequately briefed and will not consider them. *See* ***Fryer v. Conant***, 159 Wis.2d 739, 746 n.4, 465 N.W.2d 517, 520 (Ct. App. 1990). However, we note that the "Order for Judgment" concerning Betty Limbach's liability did not conclusively determine the measure of damages.

[5] We summarily reject West Bend's undeveloped argument that there was no "occurrence" as defined by the policy.

injury to real property and that such damage was not limited to the work product of Limbach. Moreover, the diminution in value determination reflects that the entire home was worthless. Thus, property damages within the policy occurred. *See* ***Sola Basic Indus., Inc. v. United States Fidelity & Guar. Co.***, 90 Wis.2d 641, 654, 280 N.W.2d 211, 217 (1979) ("tangible property may be damaged in that it is diminished in value or made useless, irrespective of actual physical injury to the tangible property").[6]

By the Court.—Judgment affirmed.

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

[6] West Bend contends that ***Sola Basic Industries, Inc. v. United States Fidelity & Guaranty Co.***, 90 Wis.2d 641, 654, 280 N.W.2d 211, 217 (1979), is not relevant because its policy definition of property damage requires "physical injury," a revision from the definition construed in ***Sola***. However, West Bend fails to consider the loss of use aspect of the definition, including "loss of use of tangible property which has not been physically injured or destroyed." ***Sola*** speaks to this aspect of the definition. *See* ***American Motorists Ins. Co. v. Trane Co.***, 718 F.2d 842, 844 (7th Cir. 1983); ***Trio's, Inc. v. Jones Sign Co., Inc.***, 151 Wis.2d 380, 384, 444 N.W.2d 443, 445 (Ct. App. 1989).