**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

February 25, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**



**No. 97-2590**

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

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**THE TRC DESIGN GROUP, LTD.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**LOU PERRINE,**
**LOU PERRINE'S GAS & GROCERIES,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from a judgment of the circuit court for Kenosha County: MARY KAY WAGNER-MALLOY, Judge. *Affirmed.*

BROWN, J. Lou Perrine appeals the trial court's factual findings in favor of The TRC Design Group, Ltd., and also contests whether those facts, even if true, meet the legal standard necessary for "substantial performance" of a contract. Because the findings of fact are not clearly erroneous and because the facts show practical fulfillment of the terms of the contract, there has been substantial performance. We affirm.

At trial, the parties presented differing accounts of the history regarding their association. The only thing the parties agreed on was that there was a written contract. The written contract, dated October 3, 1995, was for the purpose of "Planning, Design and Development of Working Drawings and Specifications" relative to a building that Perrine wanted to construct for the purpose of a combination gas station and convenience mart. The document was signed by Perrine and Thomas H. Christiansen on behalf of TRC Design Group. The agreement called for Christiansen's company to provide the following items: (a) preliminary schematics including necessary floor plans, elevations and typical cross-section; (b) working drawings; (c) specifications, outlining all trades responsibilities and general conditions of the contract; as well as to (d) obtain DILHR approval; (e) assist in bidding and negotiation procedures; and (f) provide on-site professional supervision as required by statutes and as required by Perrine.

As consideration, Christiansen was to receive an initial payment of $1600 upon the signing of the agreement, $1600 upon approval of the schematic drawings outlined in item (a), $4350 upon completion of the working drawings and specifications outlined in items (b) and (c) above, and three equal payments of $1100 as construction operations progressed, as outlined in items (d) (e) and (f).

It was undisputed that Christiansen received $1600 upon the signing of the agreement. It was also undisputed that Christiansen received $1600 more from Perrine. It was disputed whether Christiansen had done anything to earn the second payment of $1600. Christiansen claimed that he did the work to earn the second $1600 and that he also substantially performed the work listed in items (b) and (c), such that he was entitled to $4350 more from Perrine. No construction commenced before Christiansen was fired. Therefore, the obligations promised by Christiansen pursuant to (d), (e) and (f) were not performed by him and his suit did

not claim entitlement to any payment for them. Thus, the factual dispute at trial was limited to whether Christiansen substantially performed items (b) and (c) so as to be entitled to $4350.

This was Christiansen's version of the events: Perrine owned property at the southeast corner of 44th Place and 22nd Avenue in the City of Kenosha. He envisioned a convenience mart and gas station on that property. But the way Perrine wanted the convenience store built would require rezoning of the forty-five feet toward the east end of the property which was zoned residential. Perrine needed a zoning change to commercial for "this project to fly" the way Perrine wished. The residentially zoned area was included in the site plan. Perrine had already submitted the idea to city planners three or four times in the past, but without success. Prior to the signing of the contract on October 3, 1995, Christiansen asked Perrine if he really wanted to go ahead with designing a building, which would include the residentially zoned area, inasmuch as Perrine did not have the zoning change in hand. However, Perrine was under the impression that the rezoning would be approved. Perrine wanted Christiansen to assume that the forty-five feet would be rezoned commercial and, based on that assumption, to go ahead with the design of the building. With this understanding, the contract was signed.

The first activity Christiansen undertook was to prepare the schematic elevations and floor plan. Christiansen began work on this item in October and delivered them to Perrine in December. Perrine approved the schematic at that time. Christiansen then invoiced Perrine and it was paid.

The second activity was to work on the item known by the contract as "working drawings." Work in this area was affected because Perrine ordered

changes in the schematic drawings four or five different times between December and April. Throughout this time, Christiansen continually submitted revised working drawings at Perrine's request. For example, on four occasions, Perrine asked Christiansen to change the elevations to "cut some money out of the cost of the project." In addition, Perrine wanted the office up front instead of in the back. He wanted the stairs moved. He wanted the office changed again so he could place an ATM in the front. Many times, Perrine expressed approval of Christiansen's work. The working drawings were admitted as an exhibit.

The full city council was to convene on June 3, 1996, and was scheduled to determine Perrine's rezoning request at that time. A meeting was held in Perrine's office in late May. At that meeting, Perrine expressed optimism about his chances. There was no discussion of how the parties would proceed should the rezoning request fail. Christiansen was present at the council meeting. The zoning request failed to pass. After the vote took place, Perrine did not talk with Christiansen. He did not call Christiansen the next day. On June 7, Christiansen went to the hospital and eventually had heart bypass surgery. He was released on June 15. He went directly to work after leaving the hospital. Christiansen's son told him that Perrine had called. Christiansen returned the call but was told that Perrine was on the other line. He kept calling Perrine through the rest of the month but to no avail. He tried to see Perrine personally on July 7, but was not successful. During all this time, Perrine did not call him once. Finally, on approximately August 6, he called Perrine who told him that he "couldn't get ahold of me so he hired someone else."

Christiansen not only changed the working drawings per Perrine's request, several times, he also did the specifications. He kept those in his computer. He did not do the "mechanicals" (electrical, plumbing and heating), as

specified in the "working drawings" portion of the contract, because those were awaiting rezoning approval. He was not, at any time, given any direction to prepare a plan for the property without the rezoning.

Perrine had a completely different account. According to him, Christiansen's only obligation from October 1995 until the June 3 city council meeting was to provide a preliminary schematic, including the necessary floor plans, elevations and typical cross-sections. This was item (a) of the contract. The rest was on hold until his request for rezoning was determined. He never received anything from Christiansen. He paid Christiansen $1600 at the outset of the contract and paid a $1600 advance because Christiansen's wife said she needed the money to pay for the funeral of her uncle.

On May 28, a few days before the council meeting, a meeting was held between Perrine, his lawyer, the civil engineer on the project, Christiansen and Christiansen's wife. At that time, a contingency plan was arrived at in case the rezoning request failed. It was emphasized that time was of the essence because Perrine wanted the new building up before winter. It was Perrine's experience that the costs of construction rose during the winter. Perrine told Christiansen that, depending on the result of the council vote, he should commence work on one plan or the other. Christiansen was told that he had to perform. Christiansen promised that he would do whatever it took to get the job done. Everybody understood that time was of the essence.

After the negative council vote, Perrine approached Christiansen and told him that "we were all going to get together tomorrow." A meeting was held the next day, but Christiansen did not show. Perrine called Christiansen on June 4, 11, 18, 22 and 24. All attempts were unsuccessful. Finally, on July 1, he hired

someone else. A calendar logging his calls to Christiansen was admitted as an exhibit.

The trial court chose to believe Christiansen's account. It accepted Christiansen's testimony that he continually provided working drawings, found that his work product was used by Perrine in the rezoning application, found that after the council vote Perrine called Christiansen just one time, found that he continually tried to contact Perrine, without success, and that Perrine refused to see him when he personally went to Perrine's office. The trial court also rejected the factual assertions that time was of the essence after the June 3 council meeting. The court commented that not only was the contract silent about time being of the essence, "there is no evidence to mandate a conclusion that the parties intended to make it so."

The trial court further found that Christiansen invested several hours in the production and delivery of working drawings and specifications which amounted to significant professional design services. He "substantially completed" the drawings. Even though the building Christiansen designed was not the building ultimately completed, that was not his fault. Perrine's failure to secure rezoning did not excuse him from his obligation to pay for the completed work product. As for Christiansen's five days in the hospital, the trial court held that his five-day absence did not "constitute a material delay" which jeopardized the project.

Perrine begins his attack on the trial court's findings of fact by properly acknowledging that findings of fact are subject to the "clearly erroneous" rule. *See* § 805.17(2), STATS. He concedes that this court will "accept all factual determinations made unless no reasonable finder of fact could have reached the

conclusions reached by the trial court." ***State v. Suchocki***, 208 Wis.2d 509, 515, 561 N.W.2d 332, 335 (Ct. App. 1997). But Perrine nevertheless attempts to make an issue of it. We will briefly discuss each of the assertions.

First, Perrine argues that the trial court did not give proper weight to his testimony. But the fact is that the trial court rejected Perrine's historical account. Credibility is for the trier of fact to decide, and the trier of fact here obviously believed Christiansen's account, not Perrine's. The same answer can be said for Perrine's complaint that the trial court did not give appropriate weight to his other witnesses—the civil engineer and his lawyer. Again, the trial court chose not to believe their testimony to the extent it contradicted Christiansen's. We defer to that choice. Finally, Perrine attacks Christiansen's testimony. But there is nothing incredible about his testimony so as to cause this court to think that believing him over Perrine or his witnesses was unreasonable.

In addition, Perrine takes issue with certain phrases used by the trial court in making its findings of fact. He argues that there was no evidence, for instance, to support the trial court's finding that Christiansen submitted changes in the working drawings at Perrine's request. Perrine points out that his testimony was to the contrary. But, as we have just said, the trial court did not believe Perrine. He also argues that there is no support for the trial court's finding that Christiansen's work product was included in the rezoning application. Perrine reads the trial court to have meant to say that the "working drawings" were included with the application. Based on this interpretation of the trial court's words, he then argues that the only evidence of Christiansen's work being used was that of a drawing prepared by Christiansen as part of a separate contract with Perrine before the contract at issue in this case was made. But the trial court did not say that the "working drawings" were used. The trial court said what it said.

And it is undisputed that Christiansen's work product was used by Perrine in the application process. Perrine claims that there is no support for the finding that Christiansen "invested several hours" in the working drawings. This argument is meritless. Working drawings take time to produce. An inference can be drawn by the finder of fact that the constant changes Christiansen had to make on the drawings, not to mention the continuous meetings with Perrine, took "several hours." Finally, Perrine asserts that there is no evidence of substantial completion of the drawings. But Christiansen testified that the drawings were substantially complete.

Based on the findings made by the trial court, this is our "take" on the case from the trial court's perspective. Perrine hired Christiansen to work on a design for a building that depended upon approval of a rezoning request. Perrine wanted work done on that design despite knowing that approval was problematic. That was Perrine's choice. In hindsight, it was a bad one. But the fact that he wasted good money on a design that could never be implemented cannot be visited on Christiansen. The risk was taken by Perrine and he is responsible for it. The trial court obviously rejected Perrine's assertion that he did not contract for Christiansen to design a building that depended on rezoning. The trial court just as obviously rejected Perrine's account that, as the "customer," as Perrine put it, he had the right to wait and did wait until the decision on rezoning was made before directing Christiansen to proceed on the contract.

Based on the findings made, we agree with the trial court that Christiansen's work amounted to substantial performance. He completed all of the items (a) through (c) with the exception of the mechanicals, which awaited the actual rezoning. He did everything "essential" that was required of him up to the point of rezoning. That work would have been useful had the rezoning passed.

That Perrine had to start over when rezoning did not pass does not mean that Perrine can erase all the good faith work that Christiansen did up to then. Perrine bargained for a design. The conduct of both parties showed that Perrine wanted Christiansen to work on a design that would assume approval of the zoning change. Perrine received what he bargained for.

This brings us to the last point. Read in its worst light, Perrine can be heard to argue that because the agreement called for complete performance, substantial performance is not available as a remedy. If this were true, there could never be "substantial performance" because all contracts would have to be performed in their entirety. But the law has always allowed some measure of nonperformance on a contract calling for complete performance so long as the defendant has received, with relatively minor and unimportant deviations, what he or she bargained for. *See* WIS J I—CIVIL 3052. However, we choose not to ascribe such a meritless argument to Perrine. Instead, we read his argument in its best light; that is, there must be performance of all the "essential" parts of a contract before substantial performance will be found. We agree that this is the law. Here, however, the bargain was for Christiansen to design a building that depended upon rezoning in order to work. Christiansen did everything asked of him up to the time that the rezoning request failed. All that remained to be performed under the "working drawings" portion of the contract had to do with the "mechanicals" that depended upon the rezoning being achieved. The only reason this remaining work was not done was because the rezoning request failed. The trial court obviously tolerated this measure of nonperformance because it was unimportant to the main theme of the agreement—to design a building with the assumption that rezoning would take place. We tolerate it as well because all of

the "essential" ingredients of Christiansen's promise to Perrine had been delivered.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.