

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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No. 98-0811

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JULIE A. JAKUBOWSKI AND DONALD MCLEAN,

PLAINTIFFS-RESPONDENTS,

v.

ROCK VALLEY BUILDERS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rock County:
JAMES P. DALEY, Judge. *Reversed.*

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

VERGERONT, J. This is the second appeal in a dispute between Rock Valley Builders, Inc. (RVB) and Julie and Douglas McLean¹ over construction work performed by RVB on the McLeans' home. On the first appeal,

¹ Julie McLean was formerly Julie Jakubowski.

we held that the initial contract for a two-story addition provided for a second story with a dimension of twenty feet by twenty feet; that the McLeans' agreement with RVB to have the ridge (peak of roof) off center for a twenty-foot by twenty-foot second story was a binding modification of that contract; and that RVB did not breach the contract as modified. We also held that RVB violated WIS. ADM. CODE § ATCP 110.05 governing home improvement in these respects: the initial contract did not set forth clearly and accurately all the terms and conditions of the contract as required by § ATCP 110.05(2)(b) because it did not clearly state the dimensions of the second story; the initial contract did not state the start and completion dates of the work as required by § ATCP 110.05(2)(d); RVB did not provide the McLeans with a copy of the written contract before it began work as required by § ATCP 110.05(3); and the modification was not in writing as required by § ATCP 110.05(1). We remanded to the trial court for a determination of amounts owed RVB by the McLeans under the contract; a determination of whether the code violations we identified caused the McLeans pecuniary loss; and, if so, the amount of loss and the amount of attorney fees incurred to establish the violations and loss.

On remand, the trial court determined that RVB's violation of WIS. ADM. CODE § ATCP 110.05(2)(b) and (3) with respect to the initial contract caused the McLeans a pecuniary loss of \$1,200. The court doubled that amount and awarded attorney fees in the amount of \$7,500 plus costs of \$654.85, under § 100.20(5), STATS.² It then reduced that sum by \$6,532.24, the amount it

² Section 100.20(5), STATS., provides:

(5) Any person suffering pecuniary loss because of a violation by any other person of any order issued under this section [Methods of competition and trade practices] may sue for damages therefor in any court of competent jurisdiction and shall

(continued)

determined the McLeans owed RVB under the contract and in quantum meruit. Judgment was entered against RVB for the difference—\$4,022.61.

On appeal, RVB contends that the McLeans did not show they suffered any pecuniary loss as a result of the code violations, and therefore they are not entitled to damages or attorney fees. We agree with RVB that the evidence does not show that the code violations with respect to the original contract or the modification caused them a pecuniary loss. We therefore reverse.

BACKGROUND

We begin with a brief summary of the first trial to the court and our decision on the first appeal. RVB and the McLeans entered into a written contract for the addition at a cost of \$14,275, with the McLeans paying RVB \$7,275 at that time. The parties did not discover they had different understandings of the dimensions to the second story until, after several weeks of construction, Donald McLean noticed that the ridge was centered for a sixteen-foot-wide second story, not a twenty-foot-wide second story, which is what the McLeans understood the written contract provided. When RVB told the McLeans that it would cost the McLeans an additional \$1,200 to move the ridge so that it would be centered for the wider dimension, the McLeans said they did not have the money. The McLeans eventually agreed that the roof could be extended farther on one side of the ridge than the other, so that the ridge would be eight feet from one side and twelve feet from the other. After RVB had finished framing the second story and were roofing it, the McLeans fired RVB and hired Rick Carroll to reconstruct the second story with a dimension of twenty feet by twenty feet and the ridge in the

recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee.

center. The trial court concluded the initial contract called for a twenty-foot by twenty-foot second story, RVB breached that contract, and the McLeans did not waive that breach by allowing construction to continue after the breach.

Although we affirmed the trial court's construction of the initial contract, we reversed the trial court's determination regarding breach and waiver. We concluded that the McLeans' agreement to an off-center ridge was a binding modification of the initial contract. We decided that their testimony that they did not like the way it looked when it was completed was not sufficient, as a matter of law, to void the modification. Even if that were considered to be a mistaken understanding of what they were agreeing to, we held a mistake by one party is not grounds for rescission of a contract in the absence of fraud by the other party, and there was no evidence of fraud by RVB.

We also decided that the evidence did not establish economic duress as a defense to RVB's action on the contract as modified. There was no evidence, we concluded, to support one of the necessary elements to that defense—no adequate legal remedy as an alternative to agreeing to the extension of one side of the roof with an off-center ridge. In the context of discussing this element, we noted the McLeans' testimony that they were getting legal advice while they watched RVB complete the second story with the ridge off center and the extended roof on one side, after they had agreed to that. We noted the lack of evidence that the McLeans would have suffered a financial loss that could not have been compensated for in damages if they had enforced their rights under the initial written contract without first agreeing to the off-center ridge and extension of the roof. Since we decided that RVB had not breached the contract as modified, we reversed and remanded to the trial court for a determination on the amount the McLeans owed RVB.

We also reversed the trial court's determination that the ATCP code provisions did not apply, and we identified the violations we have described above. We concluded that if the McLeans "suffer[ed] pecuniary loss because of" those violations, they were entitled to recover twice the amount of that loss and costs, including reasonable attorney's fee. Section 100.20(5), STATS. Since the trial court had not determined whether any of the violations had caused a pecuniary loss, we remanded to the trial court for that determination, and, if it found a pecuniary loss, a determination on the amount of the loss and reasonable attorney fees.

At the evidentiary hearing after remand, Donald McLean and Ronald Maple of RVB testified concerning the work RVB did, including disputed add-ons to and deductions from the contract price. The court determined that RVB was due \$6,532.24 under the contract as modified, and that determination is not challenged on this appeal.

With respect to the administrative code violations, the McLeans argued on remand that they were damaged in the amount of \$5,610, which they paid Carroll to tear off the roof and wall on the second floor and reconstruct the second story with a width of twenty feet and a centered ridge. Alternatively, the McLeans argued that they were damaged in the amount of \$1,200, the amount RVB told the McLeans that it would cost to move the ridge so that it would be centered for a twenty-foot-wide second story. McLean repeated his earlier testimony that he and his wife agreed to the off-centered ridge because they could not afford the additional \$1,200 and then, after watching RVB build the frame, put on the sheathing and the rough structure, they fired RVB and hired Carroll. McLean provided no testimony concerning the reason he and his wife changed their minds after agreeing to the off-center ridge.

The trial court determined that the McLeans were damaged in the amount of \$1,200 because that was the cost of moving the ridge pole at the time the McLeans noticed it was not where they wanted it. The court determined that the McLeans were not entitled to \$5,610 in damages because, at the time it was reasonable to correct the placement of the ridge pole, the cost was \$1,200, not \$5,610. The court decided that the \$1,200 was the responsibility of RVB, not the McLeans, because it was RVB's failure to comply with the administrative code by preparing a clear and specific initial contract that caused the misunderstanding, and the McLeans could not afford the additional amount. The court made no findings concerning damages cause by RVB's failure to include in the initial contract starting and completion dates, or by RVB's failure to prepare a written contract in compliance with the code to express the parties' modification to the initial contract.

DISCUSSION

RVB makes two arguments on appeal: (1) the McLeans waived their claims regarding the administrative code violations by agreeing to a modification of the contract; and (2) the McLeans did not sustain any damages as a result of RVB's failure to comply with the code concerning the initial contract. Addressing the waiver argument first, we conclude the McLeans did not waive their claims based on the code violations by agreeing to the modification of an off-center ridge.

There is no evidence that RVB and the McLeans discussed the administrative code violations when the McLeans agreed the ridge could be placed off center for a twenty-foot-wide second story. There is therefore no evidentiary basis for concluding that they expressly waived any claims for administrative code

violations by agreeing to that specific modification, and we see no basis for inferring such a waiver in the absence of such evidence. RVB cites general authority on contract modification, but none that supports inferring a waiver on the facts in this case. RVB also cites the discussion in our first opinion on the modification of the initial contract. That discussion explained why the agreement with respect to the off-center ridge prevented the McLeans from recovering contract damages for RVB's failure to build a second story with a ridge centered for a twenty-foot width. However, that discussion does not support the conclusion that the contract modification prevents the McLeans from recovering damages for administrative code violations.

Turning to RVB's second argument, we conclude that RVB did not cause the McLeans damages in the amount of \$1,200. This was the amount RVB asserted it would charge the McLeans above the initial contract price to move the ridge so that it was centered for a twenty-foot-wide second story. Had the McLeans paid the \$1,200 in addition to the contract price, we have no doubt that we would have considered they were damaged by that amount as a result of RVB's failure to comply with the administrative code regulations concerning the specificity and clarity of the initial contract terms. However, the McLeans did not pay this amount because they agreed to the ridge remaining in place.

The McLeans' only argument supporting the trial court's decision is that we must affirm a trial court's findings on damages unless they are clearly erroneous. The McLeans do not explain how the lack of clarity and specificity in the initial contract caused them a \$1,200 loss and they point to no evidence supporting a causal connection. We understand the court felt that RVB should have been willing to bear this additional cost of correction because of its failure to comply with the code; and the court also considered it significant that the

McLeans agreed to the modification only because they could not afford the additional \$1,200 RVB demanded. However, we have already found the modification is binding, and the McLeans did not have a defense based on economic duress because they had an adequate remedy at law. Also, the statute requires that damages be measured by pecuniary loss to the homeowner and that there be a causal connection between the code violation and the pecuniary loss. We must reverse the trial court's determination because there is no evidence that the McLeans suffered a pecuniary loss in the amount of \$1,200 because of RVB's failure to comply with WIS. ADM. CODE § ATCP 110.05(2)(b) or (3).

The McLeans do not argue on appeal that any code violation concerning the initial contract caused them damages in the amount of \$5,610, the amount they paid Carroll. And we see no evidence that would support such a finding: the McLeans presented no testimony explaining why, after agreeing to the modification, they changed their mind and hired Carroll to tear down the work they had agreed to. We have also considered whether the failure of RVB to prepare a written contract setting forth the modified terms caused a pecuniary loss to the McLeans. Again, however, the McLeans presented no evidence linking that failure to the McLeans' decision to hire Carroll to tear down and rebuild RVB's work on the second story.

Because the McLeans have not shown that any code violation caused them pecuniary damage, they are not entitled to any damages or attorney fees. We are aware that, as a result of our decisions, the McLeans will end up paying \$5,600 more than they are obligated to pay under the contract with RVB, and, in addition, will have to pay their own attorney fees for this protracted litigation. We are also aware these are significant amounts for the McLeans. However, we are persuaded that the applicable law and this factual record compels the result we have reached.

By the Court.—Judgment reversed.

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