COURT OF APPEALS
DECISION
DATED AND FILED

March 7, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP1336 **Cir. Ct. No. 2009CV816**

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

BUD'S CONCRETE LLC,

PLAINTIFF-RESPONDENT,

V.

VCNA PRAIRIE WISCONSIN, INC. F/N/A CENTRAL READY MIXED, LIMITED PARTNERSHIP AND OTTAWA READY MIX,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: DONALD J. HASSIN, JR. Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. In this breach-of-contract action, VCNA Prairie Wisconsin, Inc., f/k/a Central Ready Mixed, LP, and Ottawa Ready Mix, appeals

from a judgment entered in favor of Bud's Concrete, LLC.[1] Bud's claimed that the substandard concrete mix it purchased from Central and used in driveway installations caused the driveways to prematurely deteriorate. Whether Central breached the contract is not at issue on this appeal. Rather, Central challenges only the award of future damages—over $1 million to enable Bud's to replace driveways made defective because of Central's breach. Sufficient, uncontroverted evidence supported the damage award. We therefore affirm.

¶2 These facts are undisputed. Bud's is a concrete contractor that installs residential driveways, sidewalks and patios. Central produces ready-mixed concrete and delivers it to job sites. Bud's contracts with its customers to use what is known in the industry as a "six-bag mix," and ordered the same from Central. A six-bag mix contains six bags, or 564 pounds, of Portland cement per cubic yard of concrete.[2] The mix Central supplied had 425 pounds of Portland cement supplemented with slag and/or fly ash, and used a water-to-cement ratio higher than industry standards. Central did not inform Bud's that it was providing something other than a standard six-bag mix. Out of the 206 driveways installed using the concrete Central supplied, Bud's received over 100 customer complaints about chipping, cracking, scaling and general deterioration. Several homeowners threatened to sue Bud's.

[1] VCNA Prairie Wisconsin, Inc., is the successor to the company that formerly operated as Central Ready Mixed, LP, and/or Ottawa Ready Mix. The parties refer to defendant-appellant as "Central." We will do likewise.

[2] Central disputed the meaning of a "six-bag mix" at trial but does not challenge it on appeal.

¶3 The jury determined that Central breached the contract and that the breach caused the driveways Bud's installed to prematurely deteriorate. It awarded Bud's $47,985 in past damages representing costs Bud's already incurred to address customer complaints, a $2,000 settlement with a customer who threatened to sue and sums Bud's had to "eat" when dissatisfied homeowners refused to pay. At issue here is the $1,069,338 in future damages the jury awarded for Bud's to replace the defective driveways for seventy-eight other customers, fifteen or so of whom testified at trial.

¶4 Post-verdict, Central asked that the future damages award be changed either to zero or to $317,089, the cost to repair or replace the driveways of the owners who actually testified. In the alternative, Central sought a new trial. The court denied Central's motions. It upheld the award on the basis that the record held abundant evidence from which the jury could determine both that Bud's intended to replace all seventy-eight driveways and the cost to do so. Central's appeal followed.

¶5 This court generally is reluctant to interfere with jury damage awards. ***Roach v. Keane***, 73 Wis. 2d 524, 538, 243 N.W.2d 508 (1976). We are especially loath to meddle where the trial court has reviewed the evidence and approved the damage award. ***Herman by Warshafsky v. Milwaukee Children's Hosp.***, 121 Wis. 2d 531, 545, 361 N.W.2d 297 (Ct. App. 1984). Said another way, "If there is any credible evidence which under any reasonable view supports the jury finding as to the amount of damages, especially where the verdict has the approval of the trial court, this court will not disturb the finding unless the award shocks the judicial conscience." ***Green v. Smith & Nephew AHP, Inc.***, 2000 WI App 192, ¶32, 238 Wis. 2d 477, 617 N.W.2d 881 (citation omitted).

¶6 Central first asserts that no legal theory supports the award of future damages. It argues that the award of future damages was improper because Bud's' intention to rectify its customers' dissatisfaction is nothing more than an effort to restore its reputation. Reputation damages generally are not recoverable in contract actions because they are considered too remote and not in the parties' contemplation. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 535, 331 N.W.2d 357 (1983). We decline to adopt this characterization of the damages.

¶7 Bud's neither offered evidence to support a claim for reputational harm nor argued for compensation for it. To the contrary, Bud's offered evidence showing that the cost just to remove the defective concrete, truck it away, dispose of it and then install new driveways would exceed $1.2 million. Had reputation damages been sought, the amount requested would have been higher. Satisfying its customers may have the collateral effect of restoring Bud's' professional standing, but that does not transform the award into one for reputation damages.

¶8 Central also argues that Bud's did not establish that it was in any worse position than it would have been had it received the concrete mix for which it contracted. Since damages for a breach of contract are compensatory, "[a] party whose contract has been breached cannot be placed in a better position because of the breach than he or she would have been had the contract been performed." *See* ***T & HW Enters. v. Kenosha Assocs.***, 206 Wis. 2d 591, 604, 557 N.W.2d 480 (Ct. App. 1996). Central apparently means that, through a combination of customer payment and the past-damages award, Bud's already has been fully compensated.

¶9 We disagree. In addition to compensatory damages, the wronged party also may seek consequential damages for harm arising from the breach. ***Magestro v. North Star Envtl. Const.***, 2002 WI App 182, ¶10, 256 Wis. 2d 744,

649 N.W.2d 722. Consequential damages must be foreseeable. ***State Farm Mut. Auto. Ins. Co. v. Ford Motor Co.***, 225 Wis. 2d 305, 327, 592 N.W.2d 201 (1999).

> The inquiry in each claim for future damages for breach of contract is whether or not they are traceable as the result of the breach. In all such cases the elements of the damages are involved in some uncertainty and contingency; yet if under the facts shown, it can be inferred with reasonable certainty that the breach caused the other party to the agreement pecuniary loss, then [the injured party] should be allowed to recover compensation to make good the loss ….

Richey v. Union Cent. Life Ins. Co., 140 Wis. 486, 122 N.W. 1030, 1032 (1909).

¶10 Central does not challenge the past amounts Bud's spent to remedy customer complaints but only the expenditures not yet incurred. Paul Peterson, the owner of Bud's, testified that the reason all the defective driveways were not repaired before trial, however, was that the cost would have made Bud's "broke in about a half a week." The jury heard testimony from Bud's' expert that a six-bag mix is the "tried-and-true" industry standard; that Peterson always used a six-bag mix and ordered it from Central; and that Central provided a poorer mix with a higher water-to-cement ratio. It heard the testimony of homeowners with defective driveways, saw pictures of the deteriorating concrete and heard evidence of replacement cost. The jury therefore could infer with reasonable certainty that Central's admitted breach caused the damages Bud's suffered and that the driveway problems and disgruntled customers should have been foreseeable. Without the future damages, Bud's would be in a far worse position.

¶11 Although Bud's did not make an indemnity claim, Central next asserts that indemnification is not a viable theory because indemnity "shift[s] the loss from one person who has been *compelled to pay* to another who on the basis of equitable principles should bear the loss." ***Brown v. LaChance***, 165 Wis. 2d

52, 64, 477 N.W.2d 296 (Ct. App. 1991) (emphasis added). Bud's, Central points out, has not yet made payments to the seventy-eight other homeowners.

¶12 Central's styling of the damages as "indemnification" is not controlling, however. *See* ***Watts v. Watts***, 152 Wis. 2d 370, 383, 448 N.W.2d 292 (Ct. App. 1989) (a party's legal analysis does not define this court's decision). As noted, Bud's was entitled to seek consequential damages. The award here reflects a harm that was reasonably foreseeable and a sum that was determinable with reasonable certainty and was supported by evidence sufficient to enable the jury to make a fair and reasonable approximation. *See* ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 189, 557 N.W.2d 67 (1996).

¶13 Central next complains that Wisconsin eschews damage awards for future repairs because such damages are overly speculative. We agree that damages may not be speculative or conjectural, but neither are they required to be calculated with scientific precision or mathematical certainty. *See* ***id.*** The uncertainty that prevents a recovery is uncertainty as to the fact of any damage, not to its amount. ***Cutler Cranberry Co. v. Oakdale Elec. Coop.***, 78 Wis. 2d 222, 233-34, 254 N.W.2d 234 (1977).

¶14 The fact of damage is beyond dispute. The jury heard numerous customers testify about the progressive deterioration of the driveways Bud's installed with the concrete Central supplied. It was presented photographs of the damaged driveways and a spreadsheet detailing each job Bud's sought damages on. We are satisfied that Bud's proved the fact and the amount of its damages by the greater weight of the credible evidence and to a reasonable certainty, such that the jury could make a fair and reasonable estimate. *See* WIS JI—CIVIL 1700.

¶15 Central contends, however, that the record is devoid of evidence that Bud's owes a legal obligation to any of the homeowners. It argues that Bud's made no agreements with or promises to the homeowners and gave them no express warranties, and that the statute of limitations may have run on some of the claims. Central also contends that it is "pure conjecture" anyway as to whether "all or even most" of the homeowners ever will make a claim or as to what remedy they might demand.

¶16 First, that other homeowners will make claims is not "pure conjecture." Peterson testified that the non-testifying homeowners all told him they wanted their driveways removed and replaced. Central dismisses that testimony as "inherent[ly] unreliab[le] … blatant hearsay." Its observation comes too late. "[H]earsay evidence received without objection is evidence and [is] entitled to whatever probative value it inherently possesses." ***Lasnicka v. Lasnicka***, 46 Wis. 2d 614, 618, 176 N.W.2d 297 (1970).

¶17 Second, Bud's ordered a six-bag mix from Central. Peterson produced an example of a customer proposal representing that the driveway would be poured using a six-bag mix and testified that all of his quotes state "six-bag mix." Because Central did not supply a six-bag mix, Bud's did not install its customers' driveways using a six-bag mix. Central does not dispute that the evidence was sufficient for the jury to conclude that it breached its contract by failing to supply the concrete Bud's ordered. Central has put nothing forward to persuade us that Bud's likewise is not similarly obligated to its customers to install their driveways using the concrete it said it would.

¶18 Central also argues that few of the seventy-eight homeowners would be entitled to full replacement of their driveways in any event because the correct

measure of damages would be the lesser of the cost of replacement, restoration or diminished value. If Central was dissatisfied with damages caused by its breach based on the approach Bud's presented at trial, Central was free to show, if it could, a lesser amount based on an alternative measure. *See* ***Laska v. Steinpreis***, 69 Wis. 2d 307, 314, 231 N.W.2d 196 (1975).

¶19 But Central put in no evidence to support a lesser award. It offered no alternate damage figure and no expert testimony on damages or on a viable alternative to replacement. It called none of the homeowners that it suggests are not all that disgruntled. As the trial court observed on motions after verdict, Central apparently opted for an all-or-nothing strategy. The court explained that the reason it denied Central's request for WIS JI—CIVIL 3700 on diminished value was because "there was not one sh[re]d of evidence in this record as to the diminished value of these properties." We agree. We are satisfied that Bud's proved its damages to a reasonable certainty, such that the jury could make a fair and reasonable estimate.

By the Court.—Judgment affirmed.

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