COURT OF APPEALS
DECISION
DATED AND RELEASED

AUGUST 8, 1995

NOTICE

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.

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

No. 94-2862

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

HARVEY E. SIEGEL AND PATRICK T. COWAN, BOTH INDIVIDUALLY AND AS TENANTS IN COMMON AND AS OFFICERS, DIRECTORS, AND SHAREHOLDERS OF SUPERIOR VENTURES, INC., CARLYLE L. ECKART AND SUPERIOR VENTURES, INC., A WISCONSIN CORPORATION,

Plaintiffs-Respondents,

v.

RON ALLEN, A/K/A RONALD E. ALLEN, D/B/A RONALD E. ALLEN CONTRACTING, RON ALLEN CONTRACTORS, AND RON ALLEN CONSTRUCTION, A SOLE PROPRIETORSHIP, AND GLOBE INDEMNITY COMPANY, A FOREIGN (DELAWARE) INSURANCE CORPORATION,

Defendants-Appellants.

APPEAL from a judgment and an order of the circuit court for Douglas County: MICHAEL T. LUCCI, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

LaROCQUE, J. Ron Allen and his insurer appeal a money judgment and order in favor of the plaintiffs, Harvey Siegel and Patrick Cowan, owners of Beaner's Bar, for $25,000, and Carlyle Eckart, bar lessee, for $16,765. The court ruled that Allen's negligent performance of a demolition contract caused damage to Beaner's. The court also held that the three plaintiffs were third-party beneficiaries of the contract between Allen and the City of Superior. Allen did not join the city as a party to this appeal. We conclude that neither the trial court's finding that Allen was the only negligent party nor the damages finding is clearly erroneous, and we need not address the contract issues. We therefore affirm the judgment and order.

The City of Superior entered into a written contract in 1989 with Allen, who was to raze an abandoned building (Tony's Cabaret) that shared a common inner wall with Beaner's Bar. Following the demolition, the plaintiffs brought this action alleging that water and aesthetic damages resulted due to the city's and Allen's negligence. The complaint also alleged Allen's failure to comply with the demolition specifications of the contract. Following a bench trial, the court ruled in favor of the plaintiffs, awarding Siegel and Cowan damages of $25,000 and lessee Eckart damages of approximately $16,000.

The court's initial memorandum decision found Allen negligent. In its second decision disposing of a motion for reconsideration, the court stated that although its initial decision was primarily grounded upon the theory of contract law and a belief that the defendants were third-party beneficiaries of the demolition contract with the city, its earlier finding that the evidence demonstrated Allen's negligence was confirmed.

Allen's first argument is that the court erred by interpreting an indemnification provision in his contract with the city.[1] Allen contends that the provision means only that he was liable for "improper performance" of the contract. In pursuit of this argument, Allen claims "If there was responsibility to the owners of the Beaner's building to protect against future water damage, that responsibility was not Mr. Allen's." We initially conclude that a contractor is not immune from damages to a third party merely because he is performing the

[1] The contract provided that "The Contractor will be held responsible and shall make good all damages to adjoining property caused by the execution of his work under this Contract."

work pursuant to the express terms of a contract. Negligent injury to third parties can certainly occur whether or not the provisions of a contract are met. While the early common law rejected the responsibility of a contracting party to a third party with whom he has no contract, present law is well established that "The incidental fact of the existence of the contract ... does not negative the responsibility of the actor when he enters upon a course of affirmative conduct which may be expected to affect the interests of another person." PROSSER & KEETON ON TORTS, § 93 at 668 (5th ed. 1984).

We also hold that because the city is not a party to this appeal, we need not resolve any dispute between Allen and the city over contribution or indemnity.

Allen next challenges the court's finding that he was negligent because he failed "to perform more than the contract required." The court made these findings regarding Allen's negligence:

(1) The contractor failed to remove the concrete floor and foundation walls below grade which contributed to the water problems including the basement flooding.

(2) Following the demolition which changed the party wall into an exterior wall on the east side of Beaner's, the contractor failed to take steps to waterproof said wall or to otherwise protect it from the weather, which contributed substantially to the water problems.

(3) The contractor failed to repair the roof where the flashing had been cut along the area where the buildings were joined, which caused loose flashing to be blown about damaging signs and skylights, all of which caused leaking from the area of the roof.

(4) The contractor failed to properly backfill and grade the area where Tony's had stood, which contributed to the flooding which occurred in the basement.

> (5) The contractor knew or reasonably should have known that the unusual nature of this project could negatively affect the appearance and aesthetic condition of the Beaner's building, and yet upon completion left said building aesthetically impaired as evidenced by photographs of the exterior wall on the east side as well as the east edge of the roof.

Allen argues that with the exception of paragraph (1) above, the findings of negligence are "fundamentally failures to perform extra-contractual work." Allen concedes that paragraph (1) "was a slight variation from the written specifications, but it was fully approved by the City inspectors." Allen concludes that "The thrust of the trial judge's findings is not to the effect that Mr. Allen failed to use the requisite skill in performing the requirements of the contract. The thrust of the findings is to the effect that more work should have been done to prevent the ultimate damage."

The court expressly found Allen guilty of ordinary negligence. Among the court's findings were these:

> It was very apparent that the demolition of one side of an existing structure could substantially affect the condition of the other side.
>
> ....
>
> Based upon the totality of circumstances in this matter, the court is satisfied that the contractor was negligent in the manner in which he performed the demolition work.

As noted, mere performance of a contract does not insulate the actor from negligent injury to third parties.

Allen next maintains that if this court sustains the trial court's negligence findings, those findings are incomplete because the court failed to apply the necessary comparative negligence considerations. We respectfully disagree.

In its decision denying the reconsideration motion, the court stated:

> Although the court does not believe it was necessary to also support its finding of liability upon principles of negligence, there is sufficient evidence to support the proposition that the only acts of negligence were those of the contractor who performed the work. There was no basis upon which to find any other party negligent.

Contrary to Allen's contention, the court did consider and reject a finding of negligence by other parties.

Finally, Allen contends that the damages awarded were uncertain, speculative, lacking in foundation, and contrary to the weight of the evidence and the law. Again we disagree. The owner of a damaged building may recover either the diminution in value, or the reasonable cost of repair, provided the latter does not exceed the diminution in value. ***Zindell v. Central Mut. Ins. Co.***, 222 Wis. 575, 583, 269 N.W. 327, 330-31 (1936).

The court awarded the building owners, Cowan and Siegel, a judgment of $25,000 for cost of repair after reducing their claim for failure to mitigate their flood damages once it was discovered. Allen addresses the damage awards only briefly, asserting only that:

> [D]amages may well have been awarded for the cost of weatherproofing the east wall of the Beaner's building. This is not a cost of restoration. ... [T]his is a material improvement to the building .... Exhibits 18 and 19, the written reports of Michael Endres, Plaintiffs' expert, clearly outline a course of construction to the Beaner's building that far exceeds a restoration to its prior condition.

The court heard evidence that the Beaner's building was rendered substantially unusable and that its commercial potential and marketability was

effectively destroyed. There was evidence upon which the court could reasonably conclude that the cost of repairs of $40,000 to $44,000 was well below the difference between the pre-demolition fair market value and its diminished value. This evidence included the purchase price of the original building, the amounts spent on improvements, the opinions of the owners as well as that of an expert witness. The testimony was supported with various detailed written estimates and photographs as well. Allen does not explain why the cost of weatherproofing the wall which was formerly an interior wall was not a legitimate cost of restoration in light of the exposure to the weather. After reducing the claim of Cowan and Siegel to $25,000 for failure to mitigate, the court's award for cost of repairs as less than the diminished value of the property is not clearly erroneous.

The court awarded the building tenant, Eckart, a judgment of $16,000. This figure represented an award of $10,000 for loss of personal business property, including beer, pop, liquor stock and inventory, and other business equipment; the sum of $1,765 for repair to signs damaged by roof flashing, and the sum of $5,000 as reasonable compensation for loss of time and expense of clean up. Again, the claim was substantiated by testimony and detailed exhibits showing the damage. Allen, in his cursory challenge to the damage award, does not explain why these figures were unsupported by the evidence. We therefore conclude that Eckart adequately proved the damages awarded.

By the Court. – Judgment and order affirmed.

Not recommended for publication in the official reports.