COURT OF APPEALS DECISION DATED AND RELEASED

June 27, 1996

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.

NOTICE

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No. 95-1899

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

LEON I. METZ, JOAN L. METZ
AND METZ HONEY FARM, INC.,
A WISCONSIN CORPORATION,

Plaintiffs-Appellants,

v.

PRISM CORP., SOUTHWEST,
A WISCONSIN CORPORATION,

Defendant-Respondent.

APPEAL from an order of the circuit court for Grant County: GEORGE S. CURRY, Judge. *Affirmed*.

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

DYKMAN, J. Leon I. and Joan L. Metz (Metz) appeal from an order entered upon a jury verdict finding that Prism Corporation had acted in good faith and had substantially performed a contract for the construction of a honey processing facility, and that Prism was entitled to recover $35,000 from

Metz. Metz argues that: (1) the trial court erred when it denied Metz's motion for summary judgment because Prism did not substantially perform the contract as a matter of law; (2) there is no credible evidence to support the jury's verdict that Prism acted in good faith and substantially performed; (3) repair costs and not diminished value should be used to determine whether a party has substantially performed; and (4) the form of the special jury verdict prevented the jury from considering the issue of good faith.

We conclude that: (1) the trial court did not err in denying Metz's summary judgment motion because Prism presented genuine issues of material fact as to whether it had substantially performed; (2) credible evidence supports the jury's finding that Prism acted in good faith and substantially performed; (3) diminished value, not repair costs, are the proper measure of damages; and (4) the trial court did not erroneously exercise its discretion when choosing the form of the jury verdict. Accordingly, we affirm.

BACKGROUND

In April 1991, Metz hired Prism, a general contractor, to design and build a honey processing facility. The contract called for a five-inch reinforced concrete floor, pitched to drains where possible, and for high efficiency boilers to be connected to two forced air heaters owned by Metz. Prism or a subcontractor was to provide the structural design of the foundation and building. In return, Metz promised to pay Prism $139,200. Construction began on the facility in May 1991.

Prism hired John and Greg Huza of Blackhawk Engineering, Ltd., who drafted site, floor, concrete and plumbing plans. On May 9, 1991, Greg Huza submitted a Plans Approval Application to the Department of Industry, Labor and Human Relations (DILHR) for review of the footing and foundation, building and structural components but not the heating, ventilating and air conditioning (HVAC) plans.

Robert Friesen, Prism's plumbing subcontractor, contacted Greg Huza to design the heating plan. Friesen received a "heat loss calculation" from Greg Huza in order to determine the correct boiler size and bid on the project.

Metz met with Friesen, who agreed to install a radiant panel heating system in the floor. The system would have circuits of pipes embedded within the concrete floor. Hot water would be pumped by a boiler through the pipes, heating the concrete floor and thus the interior of the building. A boiler would be connected to three heating zones. Two zones were used for heating the building and the other would provide heat for honey processing. On May 30, 1991, Prism wrote to Metz, agreeing to provide heat and pipes in the floor for the system, thereby raising the contract amount to $148,045.

The floor heating system was installed and a flat concrete floor was poured in June 1991. Greg Huza prepared drawings relating to the heating system after it was installed. He submitted a formal HVAC Plans Approval Application to DILHR on August 20, 1991, almost two months after the heating system was installed.

Metz paid Prism $100,000 in July 1991, moved into the building, and began operations in the beginning of August. Metz soon discovered that the floors were not pitched and that puddles formed in various parts of the facility. A Department of Agriculture, Trade and Consumer Protection inspector determined that the floor provided inadequate drainage. Metz agreed to reconstruct the floor. The department, nonetheless, recommended that Metz be issued a license.

Thereafter, Metz met with Floyd Kunkel of Prism and Friesen to discuss the drainage problem. It was decided that Prism would pour another layer of concrete on the floor with pitches for the drains. No one consulted the Huzas or any other engineer before pouring the additional concrete. As a result of adding another layer of concrete, the system's heating efficiency was reduced.

Following an inspection in April 1993, the department recommended that because the pipes in the floor heating system were not approved by the manufacturer to carry hot water or for use in concrete, Metz should either remove the pipes and replace them with approved piping or install a different heating system. It ordered that if a different system was installed, HVAC plans and specifications had to be approved by the department

prior to its installation. Metz estimated that a new floor heating system and concrete floor would cost about $75,000.

Metz sued Prism and Friesen for breach of contract. Prism counterclaimed against Metz for the balance due on the building contract, arguing that it had substantially performed the contract. Prism also cross-claimed against Friesen for contribution and later joined Blackhawk and Weber Concrete Services, the concrete subcontractor. Metz moved for summary judgment, arguing that Prism did not substantially perform the contract. The trial court denied the motion, concluding that genuine issues of material fact existed with respect to whether Prism had substantially performed the contract. Metz settled with Friesen before the trial.

During the trial, the trial court ruled, as a matter of law, that Prism and Friesen failed to properly perform their duties under the terms of the contract. The jury was left to decide the amount of damages owed to Metz to compensate him for the diminished value of the facility due to Prism's and Friesen's failure to properly perform their duties and to allocate responsibility between the two. The jury was also asked whether Prism acted in good faith and substantially performed its obligations under the contract and, if so, what sum of money was Prism entitled to recover from Metz for work completed.

The jury concluded that $30,000 would reasonably compensate Metz for Prism's failure to properly perform the contract and that eighty percent (or $24,000) was attributable to Prism and twenty percent (or $6,000) was attributable to Friesen. The jury also found that Prism had acted in good faith and substantially performed its obligations under the contract and that Prism was entitled to recover $35,000 from Metz for work performed.

Metz moved to set aside the jury verdict as to whether Prism substantially performed or for a new trial. The trial court denied Metz's motion, set off the verdict amounts and granted judgment against Metz in favor of Prism for $11,000. Metz appeals.

I.

Metz argues that the trial court erred in denying the motion for summary judgment. He argues that Prism did not substantially perform the contract as a matter of law because the contract called for Prism to design and construct a honey processing facility and that the facility, as built, is not operable for that purpose.

Summary judgment is appropriate when all issues of material fact are undisputed. ***Brown v. LaChance***, 165 Wis.2d 52, 60-61, 477 N.W.2d 296, 300 (Ct. App. 1991). The moving party has the burden of establishing the absence of a disputed issue as to any material fact. ***Id.*** at 61, 477 N.W.2d at 300. Where the moving party cannot meet this burden, summary judgment is inappropriate. ***Id.***

The trial court found, as a matter of law, that Prism failed to properly perform the contract. But a party's failure to complete performance under a contract, or its defective performance, does not prevent recovery if there is substantial performance of the contract. ***Tri-State Home Improvement Co. v. Mansavage***, 77 Wis.2d 648, 656, 253 N.W.2d 474, 477 (1977). The contractor must also have made a good faith effort to perform. ***Id.***

The test for substantial performance is whether the performance meets the essential purpose of the contract. ***Plante v. Jacobs***, 10 Wis.2d 567, 570, 103 N.W.2d 296, 298 (1960). Substantial performance should be granted in cases of incompleteness only when such details are inconsiderable and not the fault of the contractor. ***Tri-State***, 77 Wis.2d at 656-57, 253 N.W.2d at 477. Substantial performance does not require strict compliance with the plans and specifications of a contract unless all details are of the essence. ***DeSombre v. Bickel***, 18 Wis.2d 390, 393, 118 N.W.2d 868, 870 (1963).

The agreement between Metz and Prism provided that "Prism Corp., Southwest proposes to construct an 8,000 square foot Honey Processing Facility: material, labor, freight, and tax are included. The cost of 40,000 square feet of land is also part of this proposal." As part of the general conditions, the contract provided: "Contractor shall provide the following categories. Subcontractor shall provide also relative to their work." Those categories included: Supervision, Architectural Design, Structural Design of Foundations, Mechanical Design and Installation, Electrical Design and Installation.

On summary judgment, Metz presented evidence pointing to Prism's improper performance and its failure to substantially perform. Metz's expert, Dennis Volpe, averred that the facility "is not much more than a minimally heated warehouse as opposed to a `honey processing facility,' the use for which it was proposed." He also averred that Prism's heating subcontractor, Blackhawk,

> failed to properly calculate the heat loss which would occur where a concrete heat panel system is used. This failure, along with the others documented, has left the owner with substantially less than what was contemplated by the original proposals.... The totality of the defects, deficiencies, and areas of noncompliance with code are such that I can conclude that there was not a reasonable effort made by the contractor, Prism Corp., Southwest, the plumber, Robert Friesen, and the supervising and design engineer of record, Gregory Huza of Blackhawk Engineering, in the planning and building of the subject facility.

Volpe added that the piping used in the floor heating system was not approved by the manufacturer for hot water or floor panel heating systems, was not acceptable to the State and, therefore, was unsuitable.

In its defense on summary judgment, Prism deposed Volpe, who testified that while he had recommended that Metz remove the entire concrete floor system and install a new floor system which would cost about $75,000 and involve reconstructing a substantial part of the facility, he also testified that the concrete floor was suitable as a floor for all of Metz's needs. Floyd Kunkel, president of Prism, averred that Prism was never furnished with any specifications outlining Metz's needs but was given a rough sketch which consisted of a floor plan outlining the proposed location of an office, warehouse, boiler room, loading dock and processing room. He further averred that at no time was he advised of the amount of honey Metz planned to process.[1]

[1] Metz argues that under the parol evidence rule, these discussions should not have been admitted because the contract was plain on its face. Generally, when the terms of a

Greg Huza averred that the capacity of the boiler which was installed was more than adequate for heating the building based upon Blackhawk's heat loss calculations. He further averred that he was never provided with any specifications detailing Metz's intentions regarding honey production capacity and that if the hot water in the existing boiler was used for both heating the building and processing the honey, the capacity of the heating system could be directly affected but that other measures short of tearing up the floor and installing a new heating system could be adopted. Richard R. Geoffroy averred that the pipes used in the floor heating system were suitable for that system.

Based upon this evidence, we conclude that Prism raised a factual dispute as to whether Prism acted in good faith and substantially performed the contract. In particular, there were factual disputes concerning the type of building for which the parties contracted, whether Prism should have and did consider the amount of honey to be processed when designing and installing the heating and plumbing systems, whether the heat loss calculation and boiler size had been properly measured for the facility, whether it was necessary to tear up the entire floor or whether other measures could repair the heating problem, and whether the pipes in the floor were suitable for their intended use. Consequently, we conclude that the trial court properly denied Metz's summary judgment motion.

II.

Metz next argues that there was insufficient evidence to support the jury's verdict that Prism acted in good faith and substantially performed. To reverse a jury verdict, we must find that there is no credible evidence to support

(..continued)
contract are unambiguous, the contract must be given its plain and ordinary meaning and parol evidence is only admissible if the terms are ambiguous. ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis.2d 453, 467-68, 449 N.W.2d 35, 40-41 (1989). Whether a contract provision is ambiguous is a question of law. ***Moran v. Shern***, 60 Wis.2d 39, 46-47, 208 N.W.2d 348, 351 (1973). The contract provided that Prism and its subcontractors would provide structural, mechanical and electrical designs for the facility, but the contract is not clear that this included providing designs and installations for just the building and not the honey processing as well. Accordingly, we conclude that the contract is ambiguous on this point and that these conversations were relevant to show what Prism did and did not do and why.

it. ***Meurer v. ITT Gen. Controls***, 90 Wis.2d 438, 450, 280 N.W.2d 156, 162 (1979). We view the evidence in the light most favorable to the verdict and search for reliable evidence that will sustain it. ***Id.*** at 450-51, 280 N.W.2d at 162. We do not search for evidence that would sustain a verdict the jury could have reached, but did not. ***Id.*** at 450-51, 280 N.W.2d at 162-63. The credibility of witnesses and the weight given to their testimony are left to the jury, and where more than one reasonable inference may be drawn from the evidence, we must accept the inference drawn by the jury. ***Id.*** at 450, 280 N.W.2d at 162.

To show that a party has substantially performed, the contractor must have made a good faith effort to perform, ***Tri-State***, 77 Wis.2d at 656, 253 N.W.2d at 477, and the contractor's performance must meet the essential purpose of the contract. ***Plante***, 10 Wis.2d at 570, 103 N.W.2d at 298. Good faith is defined as "honesty in fact in the conduct or transaction concerned, that is, an honest intention to abstain from taking unfair advantage of another ...." WIS J I CIVIL—3044.

The evidence shows that a building was completed in which Metz is presently operating a honey processing business. Prism or its subcontractors provided designs and constructed the facility. In particular, John Huza drafted a site plan, floor plan, concrete plan and plumbing plan, and Greg Huza designed the heating plan. Metz's argument that Prism did not substantially perform turns on the extent to which the heating system sufficiently satisfied the terms of the contract. He contends that the contract called for the installation of a heating system that he could use to heat the facility and process all of his honey. He asserts that the system Prism and its subcontractors installed is inadequate and defective.

But the jury heard testimony from Friesen that while the pipes used in the heating system were not recommended by the manufacturer for use in concrete, the State had tested them and approved their use in Metz's building. Greg Huza testified that he was in the building when it was nearly zero degrees outside and that he was comfortable and warm inside. The trial testimony also reveals that Metz never told Prism nor did the contract specify what size boiler Metz planned to install. Friesen testified that two vats would be hooked up to the system but that Metz never told him how many pounds of honey would be processed or the amount of heat it would require. He was only told that the boiler Friesen would install would heat the building and the honey. After construction, Metz connected more vats to the system than he originally

told Prism. Friesen, Volpe and Greg Huza testified that there were other ways to improve the heating problem short of ripping out the entire floor system and installing a new one. And Volpe testified that the floor served its essential function as a floor. Greg Huza testified that when he met with Friesen about the heating plan, he was not aware that the system would also be used to process the honey. Kunkel testified that it would cost about $2,000 to repair the building.

The jury was presented with evidence that despite the defects and inadequacies, the department had licensed Metz to produce honey and that Metz has been operating the facility as a honey processing facility since 1991 and had increased his output by about 500 percent. The jury also heard evidence that Prism and its subcontractors attempted to meet Metz's needs and offered to alter the contract to meet those needs. In other words, the deficiencies did not defeat the essential purpose of the contract and there was credible evidence upon which a jury could find that Prism had acted in good faith and substantially performed.

Despite this evidence, Metz nonetheless points to a statement in ***Tri-State*** in which the court wrote that it could not hold, as a matter of law, that performing four-fifths of the contract was substantial compliance. He argues that because the cost of repairing the floor and installing a new floor heating system is more than one-fifth of the entire project, we should also hold that Prism did not substantially perform as a matter of law. We disagree.

First, we are generally hesitant to hold that a party has substantially performed a contract as a matter of law. *See* ***Wm. G. Tannhaeuser Co. v. Holiday House, Inc.***, 1 Wis.2d 370, 373-76, 83 N.W.2d 880, 882-84 (1957). The supreme court has warned:

> It is not easy to lay down rules for determining what amounts to "substantial performance," sufficient to justify a judgment for the contract price (subject to a counterclaim for injury, if asserted) in any particular case. *It is always a question of fact*, a matter of degree, a question that must be determined relatively to all the other complex factors that exist in every instance. The variation in these factors is such that

> generalization is difficult and the use of cases as precedents is difficult.

Id. at 373-74, 83 N.W.2d at 882-83 (quoting 3 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 704).

Second, in ***Tri-State***, the jury found that the contractor did not substantially perform the contract and the supreme court was only reviewing whether there was credible evidence to support that verdict. The opposite is true here. The jury found that Prism substantially performed and we need only find credible evidence to support that verdict.

Third, the fact that the supreme court could not find as a matter of law that four-fifths completion is not substantial performance does not require that we reverse a jury verdict which concluded that Metz had substantially performed. As the supreme court has warned us: "No mathematical rule relating to the percentage of the price, of cost of completion, or of completeness can be laid down to determine substantial performance of a building contract." ***Plante***, 10 Wis.2d at 572, 103 N.W.2d at 298. Where, as is here, there is credible evidence to support the jury's verdict, we will affirm even when other evidence might reasonably lead to another conclusion.

III.

The trial court ruled that Prism failed to properly perform its contract. From this, Metz argues, Prism could not have substantially performed its contract. We disagree.

The concepts of improper performance and substantial performance are not the same. Just because a party has improperly performed a contract does not mean that the party has not substantially performed. The issue is one of degree. The doctrine of substantial performance is asserted when a party has not completely or improperly performed. *See* ***Tri-State***, 77 Wis.2d at 656, 253 N.W.2d at 477.

Metz also cites ***Tri-State***, 77 Wis.2d at 657, 253 N.W.2d at 477-78, as supporting his position. But ***Tri-State*** is not controlling. In ***Tri-State***, the trial court concluded that the contractor had not performed the contract but did not find whether the contractor had substantially performed. Because of this, the court wrote, "implicit in a finding that Tri-State did not perform the contract is a finding that it did not substantially perform. We presume the trial court was aware that if Tri-State had substantially performed it was entitled to recover on the contract." But in this case, the trial court specifically left the question of performance to the jury. Moreover, as we have concluded, just because the trial court found that Prism did not properly perform does not mean that it did not substantially perform.

Metz also argues that because the trial court found that Friesen did not perform his services in a workmanlike manner, Prism, as the general contractor, must be held to a higher standard and is also liable. Metz cites no legal authority in support of this proposition. We will not consider arguments unsupported by reference to legal authority. ***State v. Shaffer***, 96 Wis.2d 531, 545-46, 292 N.W.2d 370, 378 (Ct. App. 1980). Moreover, we do not see how the fact that Friesen did not perform in a workmanlike manner means that Prism did not substantially perform or acted in bad faith.

IV.

Metz next argues that repair costs, not the diminished value of the property, are the proper measure of damages in this case and that the trial court erred when it applied the diminished value rule. We disagree.

It is well settled that the measure of damages for defects and omissions in the performance of building contracts is that the party is entitled to have what the contract calls for or its equivalent. ***DeSombre***, 18 Wis.2d at 398, 118 N.W.2d at 872. But, if reconstruction and completion in accordance with the contract involves unreasonable economic waste, then the measure of damages is the difference between the value that the building would have had if properly constructed and the value it has as constructed. ***W.G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc.***, 62 Wis.2d 220, 226, 214 N.W.2d 413, 416 (1974). In other words, when a contractor has substantially but not completely performed, the owner is entitled to the difference between the value of the building as it stands with faulty and incomplete construction and the value of the building

had it been constructed in strict accordance with the plans and specifications. ***Plante***, 10 Wis.2d at 572, 103 N.W.2d at 298-99. This is known as the diminished value rule. The cost of replacement or repair is not the measure of damages but is a factor considered in arriving at the diminished value in some circumstances. ***Id.***

Here, the trial court heard evidence that ripping out the floor and heating system and replacing it with a new one would cost about $97,000. The market value of the building was assessed at between $107,900 and $145,300. There was testimony that modifications could be made at much less cost. Reconstruction and completion would involve unreasonable economic waste. The trial court therefore correctly applied the diminished value rule.

V.

Lastly, Metz argues that the form of the special verdict prevented the jury from considering good faith in two ways: (1) by combining the issues of good faith and substantial performance in one special jury verdict; and (2) by asking the jury what amount of money would compensate Prism for its substantial performance without qualifying the word "amount" with the phrase "if any." We disagree.

The form of a special verdict rests in the discretion of the trial court and the court's chosen form will not be rejected unless the inquiry, taken with the applicable instruction, does not fairly present the material issues of fact to the jury for determination. ***Topp v. Continental Ins. Co.***, 83 Wis.2d 780, 785, 266 N.W.2d 397, 401 (1978).

In one question the jury was asked, "Did Prism Corp. in good faith perform and substantially perform its obligations under its contract with Leon and Joan Metz?" The jury replied that it did. This question required the jury to find that Prism substantially performed *and* acted in good faith before it could recover. The jury was adequately instructed on the concepts of substantial performance and good faith. The use of the conjunctive indicated to the jury that it had to consider both issues separately and independently and required it to answer both in the affirmative before it could answer yes to the special verdict. This verdict fairly presented the issues raised. The trial court did not erroneously exercise its discretion by submitting it.

We do not consider whether the trial court erred by submitting a verdict that asked how much money would compensate Prism for its substantial performance without the phrase "if any" qualifying the word "amount." Metz did not ask that the phrase "if any" be added to the verdict question. Failure to request a jury instruction or question prevents this court from considering whether the instruction or question was erroneous. Section 805.13(3), STATS.; ***State v. Schumacher***, 144 Wis.2d 388, 409, 424 N.W.2d 672, 680 (1988).

By the Court.—Order affirmed.

Not recommended for publication in the official reports.