COURT OF APPEALS
DECISION
DATED AND FILED

October 14, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

Nos. 95-2701 & 95-2904

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

No. 95-2701
MARINO CONSTRUCTION CO., INC.,

PLAINTIFF-APPELLANT-
CROSS RESPONDENT,

v.

RENNER ARCHITECTS,

DEFENDANT-RESPONDENT,

CITY OF MILWAUKEE AND BOARD OF HARBOR COMMISSIONERS FOR THE CITY OF MILWAUKEE,

DEFENDANTS-THIRD PARTY PLAINTIFFS-
RESPONDENTS-CROSS APPELLANTS,

WAUSAU INSURANCE COMPANIES,

THIRD PARTY DEFENDANT-APPELLANT-
CROSS RESPONDENT,

BLOCK IRON & SUPPLY CO., INC.

THIRD PARTY DEFENDANT,

EATON'S ASPHALT SERVICE, INC.,

A FILLINGER, INC., JOE NEVELS
LANDSCAPE CO., INC.,
MIHELICH AND ASSOCIATES, INC.,

THIRD PARTY DEFENDANTS-RESPONDENTS,

RETRO TECHNOLOGIES, INC. AND
THOMAS A. MASON CO.,

THIRD PARTY DEFENDANTS,

MARINO CONSTRUCTION CO., INC.,

THIRD PARTY PLAINTIFF,

V.

LURIE GLASS COMPANY, TRI-FORMED TOP CORP., AND
THOMAS A. MASON CO., INC.,

THIRD PARTY DEFENDANTS-RESPONDENTS,

LURIE GLASS COMPANY AND TIMOTHY PETERSON, D/B/A
PETERSON PRECAST CONCRETE PRODUCTS,

THIRD PARTY DEFENDANTS.

No. 95-2904
MARINO CONSTRUCTION CO., INC.,

PLAINTIFF,

V.

RENNER ARCHITECTS,

DEFENDANT-RESPONDENT,

CITY OF MILWAUKEE AND BOARD OF HARBOR
COMMISSIONERS FOR THE CITY OF MILWAUKEE,

DEFENDANTS-THIRD PARTY

PLAINTIFFS-APPELLANTS,

WAUSAU INSURANCE COMPANIES, BLOCK IRON & SUPPLY CO., INC., A FILLINGER, INC., JOE NEVELS LANDSCAPE CO., INC., MIHELICH AND ASSOCIATES, INC., RETRO TECHNOLOGIES AND, THOMAS A. MASON CO., INC.

THIRD PARTY DEFENDANTS,

MARINO CONSTRUCTION CO., INC.,

THIRD PARTY PLAINTIFF,

V.

EATON'S ASPHALT SERVICE, INC., TRI-FORMED TOP CORP., THOMAS A. MASON CO., INC., LURIE GLASS COMPANY, AND TIMOTHY PETERSON, D/B/A PETERSON PRECAST CONCRETE PRODUCTS,

THIRD PARTY DEFENDANTS.

APPEAL and CROSS-APPEAL from judgments of the circuit court for Milwaukee County: PATRICK J. MADDEN, Judge. *Affirmed in part; reversed in part and cause remanded with instructions.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

PER CURIAM. Marino Construction Co., Inc. appeals from judgments entered after a jury found that it had breached its contract with the City of Milwaukee and Board of Harbor Commissioners for the City of Milwaukee for the construction of the Port of Milwaukee Administration Building. It claims that

the trial court erred: (1) when it dismissed its negligence claim against Renner Architects; (2) with regard to its determination of proper damages; (3) in instructing the jury and formulating the verdict; (4) when it inquired as to damages caused by Marino's delay; and (5) when it ordered judgment in favor of Marino's subcontractors. Marino also argues that the judgments should be reversed in the interest of justice because the real issues were not tried. Because the trial court did not err: (1) when it dismissed Renner from this action; (2) in assessing Marino's damages; (3) in instructing the jury and formulating the verdict; (4) with respect to the issues surrounding Marino's delay; and (5) when it ordered that the subcontractors were entitled to judgment against Marino; we reject Marino's appeal and affirm the judgments as to it. We also conclude that the real issues were tried and, therefore, there is no merit to Marino's request to reverse "in the interest of justice."

The City cross-appealed from the jury's verdict, alleging that the trial court erred when it ruled that the City was not entitled to collect liquidated damages from Marino. Because we conclude that the City is entitled to receive liquidated damages, we reverse this portion of the judgment and remand for a new trial on the issue of the number of days that Marino delayed construction from February 28, 1992, through July 27, 1992. We hold that the City is entitled to receive its liquidated damages for each day of that delay.

The City also filed a separate appeal from the judgment dismissing its cross-claim against Renner Architects.[1] It claims that the trial court erred in dismissing the claim because: (1) the contract between the City and Renner

[1] These two separate appeals were consolidated by order of this court.

contained a valid and enforceable indemnification clause; and (2) the City sufficiently proved Renner's share of responsibility for any delay damages awarded to Marino. Because the trial court did not err when it dismissed Renner Architects, we affirm that judgment.

I. BACKGROUND

On August 26, 1991, Marino and the City entered into a contract under which Marino would act as the general contractor to construct the Port of Milwaukee Administration Building.[2] The City had previously hired Renner Architects to design the building and supervise construction. The contract agreed to pay Marino $897,711[3] and the construction was to be completed by February 7, 1992. The City alleges that Marino proceeded in "an inconsistent and haphazard fashion."

At the end of June 1992, Marino indicated that it had completed its work and requested a final inspection. An inspection was conducted on July 1, 1992, by Renner representative, Albert F. Knaak. Knaak prepared a seventeen-page "punchlist" listing several hundred items of incomplete or substandard work. The list was sent to Marino with a request to remedy the listed items. The City alleged that Marino failed to satisfactorily correct the punchlist items. On July 20, 1992, another inspection was conducted, yielding additional items of incomplete or substandard work, including water leakage around the windows and a structural defect in the west foundation wall.

---

[2] Marino's surety, Wausau Insurance Companies, also signed the contract as required by § 30.32(7), STATS.

[3] The price was increased to $911,918 because of selection of alternate items and agreed upon modifications.

The City terminated Marino for cause on July 27, 1992. Pursuant to the contract, the City hired its own "completion contractors" to complete or repair the incomplete or substandard work. The City incurred a total of $195,104.63 in completion costs.

As of the date that Marino was terminated, the City had paid it $637,468.59. Accordingly, Marino claimed it was entitled to the balance of $274,449.41. It sued the City, alleging breach of contract and negligence. It also named Renner as a defendant, alleging Renner had negligently prepared the plans and specifications for the building. The City cross-claimed against Renner for indemnification and counterclaimed against Marino for liquidated damages and inspection charges pursuant to the contract.[4] The City and Marino joined certain of Marino's subcontractors because of lien claims or because of claims that the subcontractors' work was defective. Various subcontractors cross-claimed for unpaid balances on their contracts with Marino.

The case was tried to a jury. Prior to submitting the case to the jury, the trial court dismissed the City's liquidated damage claim on common law grounds. The jury returned a verdict finding that: (1) Marino had not substantially performed its contract with the City at the time it was terminated; (2) the City reasonably and necessarily incurred $127,148.86 in completion costs; (3) Marino was not entitled to any additional payments; (4) the City caused delay equal to $20,000 worth of damages to Marino; (5) Marino caused delay costs to the City of $6,322.40; and (6) subcontractor Lurie Companies, Inc. failed to perform its

[4] The City also filed a third-party complaint against Marino's surety, Wausau, on the same issue.

obligations under its contract with Marino, but this failure was not a substantial factor contributing to costs charged to Marino.

The trial court dismissed Renner from the case on the bases that: (1) there was no evidence to indicate that Renner was negligent in the preparation of plans and specifications; and (2) the City had failed to apportion responsibility for damages recovered by Marino against the City as between the City and Renner.

Postverdict motions were denied. Marino and the City appealed. The City cross-appealed.

II. DISCUSSION

A. Marino's Appeal.

1. Dismissal of Renner.

Marino claims that Renner was improperly dismissed from this action. The trial court dismissed Renner stating: "Marino's only claim of negligence against Renner was in regard to drafting the plans and specifications. In considering the testimony I ordered stricken and all of the testimony in the case, there's no evidence to support this claim, and it is dismissed." Later, it reaffirmed the ruling, explaining: "[T]he ruling of the Court is that Marino failed in its proof of that because it failed to show how much harm Renner caused, in other words, applying apportionment of that, so Renner is out for that reason in Marino's case in chief against Renner." In other words, the trial court held that Marino had the burden of introducing evidence allocating damages between the City, which was sued in a contract action and Renner, which was sued for negligence. Marino's

response is that it did not have to introduce this evidence because the jury has the task of apportioning negligence. We reject Marino's contention.

The question of whether the burden of proof has been met is a question of law. *See* ***Brandt v. Brandt***, 145 Wis.2d 394, 409, 427 N.W.2d 126, 131 (Ct. App. 1988). This case is not purely a negligence case. It involved a contract claim against the City and a negligence claim against Renner. Because the legal principles applicable to contract claim damages and tort claim damages are different, evidence of apportionment is required in contract cases. *See* ***Mega Constr. Co., Inc. v. United States***, 29 Fed. Cl. 396, 424 (1993); ***Blinderman Constr. Co., Inc. v. United States***, 695 F.2d 552, 559 (Fed. Cir. 1982). Because Marino failed to introduce evidence apportioning the damage between the City and Renner, it has not satisfied its burden of proof and, therefore, the trial court did not err in dismissing Marino's claim against Renner.[5]

2. Damage Issues.

Marino claims that special verdict question number 3 was unnecessary and improper and interfered with awarding it the proper amount of damages. Question number 3 asked what sum would justly and equitably compensate Marino for the work it performed on the contract prior to July 27, 1992. The jury said Marino was entitled to no compensation. Marino argues that the City did not pay it $274,449.91 of the contract price and, because the jury

[5] Marino raises a peripheral issue on this point. It argues that the trial court improperly struck expert witness testimony of a professional engineer who testified as to the design errors made by Renner. The trial court struck the testimony because it concluded an engineer was not qualified to testify as to an architect's negligence. We need not address the substance of this argument, however, because Marino failed to make an offer of proof. This is required in order to preserve the matter for appeal. *See* § 901.03(1)(b), STATS.

found that the City suffered only $127,148.86 in completion damages, Marino is entitled to the difference between these two figures, or $147,301.05. We reject Marino's claim.

Our review on this issue involves a mixed standard of review. The form of a special verdict is committed to the discretion of the trial court. *See* ***Meurer v. ITT Gen. Controls***, 90 Wis.2d 438, 445, 280 N.W.2d 156, 160 (1979). Whether, however, there is evidence that warrants the submission of a matter to the jury is a question of law subject to independent review. *See* ***Gierach v. Snap-On Tools Corp.***, 79 Wis.2d 47, 55-57, 255 N.W.2d 465, 468-69 (1977).

We conclude that the trial court did not erroneously exercise its discretion in formulating this verdict question. If the jury had found that Marino did substantially perform its obligations pursuant to the contract, this question was required to determine an appropriate damage amount. However, the jury found that Marino failed to substantially perform under the contract. There is evidence to support this finding rampant throughout the record, including the facts that the building could not be occupied, and that hundreds of work items were either incomplete or substandard.

A contractor is entitled to the "value" under the contract as suggested by Marino when the contractor has substantially performed on the contract. *See* ***Klug & Smith Co. v. Sommer***, 83 Wis.2d 378, 386, 265 N.W.2d 269, 272 (1978); ***Plante v. Jacobs***, 10 Wis.2d 567, 572, 103 N.W.2d 296, 298 (1960). The jury found that Marino had not substantially performed and therefore was not entitled to "value" damages. Further, Marino failed to introduce any evidence as to the just or equitable value of its work. This is supported by the record and, therefore, Marino's argument on this point has no merit.

Marino also argues that the trial court erred by prohibiting proof regarding the Eichleay Formula in relation to damage for delay claims. *See* ***Conti Corp. v. Ohio Dep't of Admin. Servs.***, 629 N.E.2d 1073, 1077-78 (Ohio Ct. App. 1993). The Eichleay Formula applies in construction cases when the contractor is forced to stand by and is precluded from taking other work because of a delay for which the owner is responsible. We decline to consider this argument because it is insufficiently developed. *See* ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

3. Instructions/Verdict.

Marino raises a variety of challenges regarding the jury instructions/verdict: (1) the trial court should have given a diminished value damage instruction; (2) the trial court should have instructed on the duty to mitigate; (3) the trial court's instruction regarding substantial performance was erroneous; (4) the trial court erred by formulating verdict question 8 in a way that assumed that Marino had caused delay; (5) the trial court should not have instructed the jury that the City was not a guarantor for the prompt and faithful performance of the architect, Renner; (6) the trial court failed to instruct or submit a verdict question saying that the City was responsible for delays caused by other prime contractors; (7) the trial court refused to give an instruction defining delays that were compensable and delays that were not. We reject each in turn.

A trial court has wide discretion in formulating the special verdict and in deciding what instructions to give to a jury. *See* ***Gierach***, 79 Wis.2d at 55-57, 255 N.W.2d at 468-69; ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976). If the instructions of the court adequately cover the law applicable to the facts, this court will not reverse. ***Id.***

Marino argues that the trial court should have instructed the jury on diminished value instead of allowing the jury to award damages based on the cost to repair. We are not convinced. The diminished value rule only applies where defects in a building cannot be remedied without reconstructing a substantial part of the building. Where defects can be repaired without unreasonable economic waste, the cost of repair rule applies. *See* ***W.G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc.***, 62 Wis.2d 220, 225-27, 214 N.W.2d 413, 416-17 (1974). Which rule to apply is left to the discretion of the trial court. *See* ***J.G. Jansen Inc. v. Rilling***, 203 Wis. 193, 200-201, 232 N.W. 887, 889 (1930). In the instant case, the trial court applied the cost to repair rule because it determined that there was no evidence of diminished value. This was not an erroneous exercise of discretion. The record demonstrates that neither side introduced any evidence of diminished value.

Marino next claims that the trial court should have given an instruction on the City's duty to mitigate its damages. We disagree. The trial court instructed the jury to award damages only that were "reasonable and necessary" and therefore it was not necessary to also give a duty to mitigate instruction. The trial court determined that the standards of reasonableness and necessity constitute the appropriate measure for evaluation of completion/repair costs. This was a proper exercise of discretion. *See* ***Wiggins Constr. Co. v. Joint School Dist. No. 3***, 35 Wis.2d 632, 639-40, 151 N.W.2d 642, 646 (1967).

Marino next claims that the trial court's instruction as to substantial performance was erroneous. We disagree.

The trial court gave WIS J I–CIVIL 3052.[6] Marino argues that this was inappropriate because the trial court should have given a substantial performance instruction suitable for building contract cases. We reject Marino's claim.

WIS J I–CIVIL 3052 is an accurate statement of the law. We are not persuaded by Marino's claim that WIS J I–CIVIL 3700 states that WIS J I–CIVIL 3052 is not suitable for building contract cases. We have reviewed WIS J I–CIVIL 3700 and do not reach a similar conclusion. This instruction applies to damages, not to instructing the jury on substantial performance. Accordingly, the trial court did not erroneously exercise its discretion in charging the jury with WIS J I–CIVIL 3052.

[6] This instruction provides:

> Each party to a contract has a duty to perform his or her obligations under the contract.
>
> Evidence has been received that (defendant) may not have completely performed his or her obligations. A failure to complete performance under a contract, or a defective performance, does not prevent recovery if you find that there was substantial performance of the contract. You must first find that there was a good faith effort to perform; if you find that a good faith effort was made, you will then proceed to determine whether the performance was, in a legal sense, substantial.
>
> Performance may be substantial even though every detail is not in strict compliance with the terms of the contract; something less than perfection is required. Some measure of nonperformance will be tolerated if (defendant) has received, with relatively minor and unimportant deviations, what he or she bargained for. But if the defect or uncompleted performance is of such extent and nature that there has been no practical fulfillment of the terms of the contract, then there has been no substantial performance.

Marino next claims the trial court erred by formulating verdict question 8 in a way that assumed that Marino had caused delay. The question asked: "What sums, if any, will reasonably compensate the City of Milwaukee/Board of Harbor Commissioners for costs they incurred as a result of any delay caused by Marino Construction Co., Inc., through July 27, 1992?" We reject Marino's complaint.

The question does not conclude that Marino did cause delay. It asks, what sum *if any* would compensate the City as a result of *any* delay caused by Marino. This language certainly contemplates that Marino may not be the cause of any delay. Therefore, Marino's contention is without merit and the question as formulated by the trial court is not erroneous.

Next, Marino claims the trial court should not have instructed the jury that the City was not a guarantor for the prompt and faithful performance of the architect, Renner. It argues that this instruction confused the jury or negated the proper instruction that any delay on the part of Renner should be imputed to the City.

The challenged instruction provided:

> The City of Milwaukee/Board of Harbor Commissioners were not the guarantors for prompt and faithful performance by Renner or any other prime contractor. The City/Board is also responsible, however, for any delay caused by Renner Architects in Renner's performance of acts the City of Milwaukee/Board of Harbor Commissioners authorized them to do.

We do not read the same conflict into this instruction as Marino does. The trial court ruled that Renner was an agent of the City. Accordingly, the City became responsible for any delay caused by Renner for acts authorized by the City. That

does not mean the City becomes a guarantor of Renner's work. The instruction was not erroneous.

Next, Marino claims that the trial court failed to instruct or submit a verdict question saying that the City was responsible for delays caused by other prime contractors. We reject this contention. Although Marino alleges that this failure was prejudicial, it does not develop that argument. Marino fails to argue how the absence of such an instruction prejudiced it. Accordingly, we cannot conclude that the trial court erroneously exercised its discretion by failing to give the requested instruction.

Finally, Marino claims that the trial court refused to give an instruction defining delays that were compensable and delays that were not. The argument on this contention consists of two sentences and no citation to authority. We deem it insufficiently developed and decline to address it. *See* ***Barakat***, 191 Wis.2d at 786, 530 N.W.2d at 398.[7]

4. Delay Damages.

Marino contends that its claims for delay damages did not receive proper consideration. Specifically, it argues that the City should not be able to recover delay damages because a concurrent electrical delay existed. In other words, the City could not occupy the building because of an electrical problem which Marino had no control over. Marino argues that during a period of concurrent delay allowable to each of two parties, neither can recover from the

[7] Marino raises a handful of additional objections to the instructions or the verdict. None are worthy of discussion within the text of this opinion. Each is either undeveloped or without merit.

other. *See* ***Wright v. Friedman Dep't Store Co.***, 189 Wis. 128, 135-36, 207 N.W. 417, 420 (1926). Although this is a correct statement of the law, there was evidence in the record to show that the electrical work could have been completed within five days and did not prohibit occupancy of the building. Accordingly, it was within the jury's province to conclude that the electrical delay was not concurrent with the general delay, that the electrical contractor did not delay or hinder Marino's work, that virtually all of the corrective electrical work could have been performed after occupancy of the building, and the fact that the building could not be occupied until January 1993 was due to Marino's breach of the contract and had nothing to do with the electrical contractor.

Marino also claims that the trial court erred by refusing to allocate any delay attributable to Peterson Precast to the City. Peterson was the supplier of the window surrounds. We reject Marino's claim. Marino, as the general contractor for the job, was responsible for both its own acts, errors and omissions as well as those of any of its subcontractors and suppliers. This included Peterson. Peterson was a supplier of Marino. Marino stipulated to this fact. Accordingly, the trial court did not err in refusing to allow Marino to allocate any delay caused by Peterson to the City.

5. Judgments of Subcontractors.

Marino claims the trial court erred in granting judgment to its subcontractors because each subcontractor had agreed to be paid only when Marino was paid. We reject this claim. Marino has been paid $637,468.59. The jury determined that it was not entitled to any additional payments. The trial court

found that these facts satisfied the "pay when paid" provisions of the subcontractors contracts with Marino. We agree.[8]

6. Interest of Justice.

Finally, Marino claims it is entitled to a new trial in the interest of justice because the real controversy has not been tried. We see nothing in the record to support this contention. We have rejected each of Marino's claims of errors. Zero plus zero equals zero. *See* ***State v. Echols***, 152 Wis.2d 725, 745, 449 N.W.2d 320, 327 (Ct. App. 1989).[9]

B. City's Cross-Appeal.

The City claims that the trial court erred when it ruled, during the trial, that the liquidated damages provision of the contract between the City and Marino was subject to evaluation according to common law standards; that under this analysis, the provision constituted a penalty and, therefore, concluded that the

---

[8] Marino also argues that the verdict questions applicable to the subcontractors were erroneous and/or that the trial court failed to properly instruct with respect to these questions. He argues that the questions were ambiguous or the questions were inconsistent with other parts of the verdict. Marino's arguments in this regard are not well-developed and lack adequate citation to proper authority. Accordingly, we decline to consider them. ***Barakat v. DHSS***, 191 Wis.2d 769, 786, 530 N.W.2d 392, 398 (Ct. App. 1995).

[9] Marino raises the following miscellaneous issues. First, it argues that charges incurred for inspection and supervision of the completion and repair work by city employees and Renner were not items of damage. We disagree. The costs associated with these employees were consequential damages as a result of Marino's breach of the contract and therefore recoverable. *See* ***City of Milwaukee v. Allied Smelting Corp.***, 117 Wis.2d 377, 394-96, 344 N.W.2d 523, 531-32 (Ct. App. 1983), *overruled on other grounds by* ***Just v. Land Reclamation, Ltd.***, 155 Wis.2d 737, 157 Wis.2d 507, 456 N.W.2d 570 (1990).

Second, it argues that the City could not charge for utilities after July 27, 1992, and that the City waived its right to claim damages for the sidewalk, the carpets, and the floor. These arguments are undeveloped and therefore will not be addressed. *See* ***Barakat***, 191 Wis.2d at 786, 530 N.W.2d at 398.

City could not enforce its provisions. As a result, the trial court rejected the City's request to include a question on the special verdict inquiring as to the number of days that Marino delayed performance of the contract. The City argues that the trial court erred in applying the common law analysis because the contract's liquidated damage provision is mandated by statute, § 30.32(6)(b), STATS. We agree and reverse this part of the judgment.

The contract between the City and Marino contained a liquidated damage provision. The provision provided a daily damage rate equal to a percentage of the total original contract price. Specifically, the provision provided:

> SURETY'S GUARANTEE OF LIQUIDATED DAMAGES FOR DELAYED PERFORMANCE
>
> If an extension of the time for completion is not allowed by the Board of Harbor Commissioners, then the Surety will guarantee payment by the Contractor of liquidated damages in the certain sum of one-half of one percent of the total original contract price for each day of the extension period that the work remains uncompleted. In addition, the Surety will also guarantee payment by the Contractor of the sum of Two Hundred Seventy Dollars ($270.00) per day as inspection charges for each day of the extension period that the work remains uncompleted.
>
> The Surety hereby certifies that no City official or employe has any interest, direct or indirect, or is receiving any premium, commission, fee or other thing of value on account of furnishing this guarantee.

This provision was amended to reduce the daily liquidated damages rate from .5% to .2%. Marino and its surety, Wausau, signed the contract with these liquidated damages provisions. The City argued that the delay from the original date of project completion–February 28, 1992, until the date of Marino's termination–July 7, 1992, entitled it to liquidated damages. The trial court dismissed the City's

claim for liquidated damages, ruling that under common law, the City's liquidated damages provision amounted to a penalty and therefore could not be awarded.

The issue in this cross-appeal involves both the interpretation of a statute and the construction of a contract. Both are questions of law that we review independently. *See* ***State ex rel. Town of Delavan v. Walworth County Circuit Court***, 167 Wis.2d 719, 723, 482 N.W.2d 899, 900-901 (1992); ***Smith v. Atlantic Mut. Ins. Co.***, 155 Wis.2d 808, 810, 456 N.W.2d 597, 598 (1990).

Section 30.32(6), STATS.,[10] requires that the contract contain a liquidated damage provision, either a fixed sum or a daily rate. The statute specifically provides that the daily sum "shall be such an amount as in the judgment of the officer or agency in charge of letting the contract will save the

[10] Section 30.32(6), STATS., provides:

> CONTRACTS TO PROVIDE FOR LIQUIDATED DAMAGES. Every contract executed pursuant to sub. (1) shall contain either of the following agreements on the part of the contractor and the contractor's sureties:
>
> (a) An agreement that in case such contractor fails to fully and completely perform the contract within the time therein limited for the performance thereof, the contractor shall pay to the municipality as liquidated damages for such default, a fixed sum to be named in the contract, which shall be such a sum as in the judgment of the officer or agency in charge of letting the contract will save the municipality harmless on account of such default and insure the prompt completion of the contract; or
>
> (b) An agreement that in case such contractor fails to fully and completely perform the contractor's part of the contract within the time therein limited for the performance thereof, the contractor shall pay to the municipality as liquidated damages for such default, a definite sum to be named in the contract for each day's delay in completing such contract after the time therein listed for its completion, which daily sum shall be such an amount as in the judgment of the officer or agency in charge of letting the contract will save the municipality harmless on account of such default and insure the prompt completion of the contract.

municipality harmless on account of such default and insure the prompt completion of the contract." This indicates a legislative intent to supplant the common law standards of analysis of liquidated damage clauses. The City asserted that the statute governed. The trial court rejected this assertion and applied common law. This was erroneous.

The statute applies. The statute requires there to be a liquidation damages clause when the Board of Harbor Commission constructs a harbor facility. The liquidated damages clause in the contract was in compliance with the statute. Where a statute clearly differs from the common law, a court must give effect to the statute as written. *See* ***Waukesha County v. Johnson***, 107 Wis.2d 155, 163, 320 N.W.2d 1, 4 (Ct. App. 1982). The trial court failed to apply § 30.32(6), STATS., which is directly applicable here. Instead, it applied common law that conflicted with the statute. Hence, it committed reversible error.

The City is entitled to liquidated damages. However, according to the jury's verdict, both the City and Marino were partially responsible for the delay. Therefore, we are unable to simply calculate the liquidated damages and direct judgment. This case must be remanded for a new trial on the sole issue of the number of days that Marino delayed construction between February 28, 1992, and July 27, 1992. The City is entitled to receive its liquidated damages and daily inspection costs for each of those days that the jury finds Marino responsible.[11]

[11] We note that Marino argues that the trial court found that the City did not exercise judgment in selecting a daily rate. This is not dispositive. According to § 30.32(6), STATS., the legislature left this task to the contracting officer, not to the courts. None of Marino's remaining arguments with respect to this issue alter our conclusion.

C. City's Direct Appeal.

The City also filed a direct appeal claiming that the trial court erred when it dismissed its cross-claim against Renner. The City claimed that Renner was obligated to indemnify it by virtue of an indemnification agreement. The trial court dismissed the City's cross-claim on the bases that: (1) there was no evidence to support Marino's claim that Renner was negligent in connection with the drafting of the plans and specifications; and, therefore, there was no claim upon which the indemnification could attach; and (2) the City failed to introduce any evidence from which the jury could apportion how much of the delay was attributable to the City and how much was attributable to Renner. The City claims the trial court erred because it nullified the indemnification provisions of the contract between the City and Renner and because the City proved Renner's share of responsibility for delay damages. We reject these arguments and affirm.

In ***Hermann v. Town of Delavan***, 208 Wis.2d 217, 220-21, 560 N.W.2d 280, 281- 82 (Ct. App. 1996), we set forth the standard for reviewing the trial court's dismissal of a party's claim. In determining whether a claim should be dismissed for failure to state a cause of action upon which relief may be granted, the facts pled are taken as admitted. ***Id.*** Whether facts exist to state a cause of action is a question of law which we decide without deference to the trial court. ***Id.*** Further, whether a party has a right to indemnification is a question of law which we review independently. *See* ***Kutner v. Moore***, 159 Wis.2d 120, 125, 464 N.W.2d 18, 20 (Ct. App. 1990).

1. Nullification.

The City first alleges that the trial court should not have dismissed its cross-claim because such action effectively nullified the contractual

indemnification provision. When the City hired Renner to design the building, a contract was executed which contained an indemnification provision. The provision provided:

> Except as exempted by Section XXVI, in case any action in court or proceeding before an administrative agency is brought against the CITY or any of its officers, agents or employes for the failure, omission or neglect of the CONSULTANT to perform any of the covenants, acts, matters or other requirements of this Contract undertaken, or for injury or damage caused by the alleged negligence of the CONSULTANT, its officers, agents or employes, the CONSULTANT shall indemnify and save harmless the CITY, its officers, agents and employes from all losses, damages, costs, expenses, judgments or decrees arising out of such action. The CITY shall tender the defense of any claim or action at law or in equity to the CONSULTANT or CONSULTANT's insurer, and upon such tender it shall be the duty of the CONSULTANT or CONSULTANT's insurer to defend such claim or action without cost or expense to the CITY, officers, agents or employes. The CONSULTANT's shall be responsible for the conduct and performance of the services required under the terms and conditions of this Contract and for the results therefrom.

The City contends that when the trial court dismissed the cross-claim, it illegally nullified this indemnification provision because it rendered this portion of the contract "surplusage," contrary to case law. *See* ***Rockline Inc. v. Wisconsn Physicians Serv. Ins.***, 175 Wis.2d 583, 593, 499 N.W.2d 292, 297 (Ct. App. 1993). The City also argues that the trial court erred when it concluded that because Marino had not proved any negligence against Renner, the City's cross-claim must be dismissed. We disagree.

The language of the indemnification provision clearly states that Renner must be negligent before it is obligated to reimburse the City for that portion of damages assessed against the City attributable to Renner's negligence. It logically follows, therefore, based on the language of the indemnification

agreement, that if there is no evidence of Renner's negligence, the City will not be able to collect from Renner.

The City also admits that the "indemnification contract extends only to the acts, errors, omissions, or negligence" of Renner and not to those of the City. The City, however, fails to demonstrate how any of the damages that were assessed against the City flow from or are a consequence of Renner's negligence. The trial court, therefore, did not nullify the indemnification provision. Rather, the facts of the case failed to invoke the provision.

2. Apportionment.

The City also challenges the trial court's alternative reasoning for dismissing the cross-claim—that the City failed to introduce evidence from which the jury could apportion the delay damages awarded to Marino as between the City and Renner. We reject this claim as well.

The question of whether the burden of proof has been met is a question of law. *See* ***Brandt***, 145 Wis.2d at 409, 427 N.W.2d at 131. Marino sued the City in contract and tort and sued Renner solely in tort. The jury found that the City caused Marino $20,000 worth of delay damages. The City argues that it did satisfy its burden of proving the share of responsibility between it and Renner. It claims that Renner was 100% responsible and the City was 0% responsible. We are not persuaded.

The City had the burden of proving what damages it claims fall within the ambit of the indemnification agreement. *See* ***Plywood Oshkosh, Inc. v. Van's Realty & Constr. of Appleton, Inc.***, 80 Wis.2d 26, 31, 257 N.W.2d 847, 849 (1977). Its brief is silent with respect to any of those damages. In fact, the

City specifically admits that it "does not contend or believe that either it or Renner did anything wrong." If Renner was not negligent, then the indemnification agreement does not apply.

III. CONCLUSION

In sum, we reject each of Marino's issues raised in this appeal and affirm the judgments with respect to it. We similarly reject the City's direct appeal and affirm the judgment in that respect. With respect the City's cross-appeal, however, we reverse that portion of the judgment and remand for a new trial on the issue of the number of days that Marino delayed construction from February 28, 1992, through July 27, 1992. We hold that the City is entitled to receive its liquidated damages and inspection costs for each day of that delay.

By the Court.—Judgments affirmed in part; reversed in part and cause remanded with instructions.

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