

Nos. 96-3159, 96-3597

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**NAOMI ANDERSON, INDIVIDUALLY AND AS THE ESTATE
PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD
ALLAN ANDERSON,**

PLAINTIFF,

v.

CON/SPEC CORPORATION,

**DEFENDANT-
THIRD PARTY PLAINTIFF,**

AMERICAN FAMILY INSURANCE,

DEFENDANT,

**ZAPPA BROTHERS AND CONTINENTAL WESTERN
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

DONALD BAKER AND GARY LEONARD GRIFFITHS,

DEFENDANT,

v.

**BE ARCHITECTS, INC., AND WESTFIELD INSURANCE
COMPANY,**

**THIRD PARTY DEFENDANTS-
APPELLANTS,**

**BERNARD G. STROH, D/B/A STROH ENGINEERING,
INTERNATIONAL INSURANCE CO., ADVANCED CONCRETE
& MASONRY, CNA INSURANCE COMPANY,**

THIRD PARTY DEFENDANTS.

**NAOMI ANDERSON, INDIVIDUALLY AND AS THE
PERSONAL REPRESENTATIVE OF THE ESTATE OF TODD
ALLAN ANDERSON,**

PLAINTIFF,

v.

CON/SPEC CORPORATION,

**DEFENDANT-
THIRD PARTY PLAINTIFF-APPELLANT,**

AMERICAN FAMILY INSURANCE,

DEFENDANT-APPELLANT,

**ZAPPA BROTHERS AND CONTINENTAL WESTERN
INSURANCE COMPANY,**

DEFENDANTS-RESPONDENTS,

DONALD BAKER AND GARY LEONARD GRIFFITHS,

DEFENDANT,

v.

**BE ARCHITECTS, INC., WESTFIELD COMPANY, BERNARD
G. STROH D/B/A STROH ENGINEERING, INTERNATIONAL
INSURANCE CO., ADVANCED CONCRETE AND MASONRY,
AND CNA INSURANCE COMPANY**

THIRD PARTY DEFENDANTS.

ERRATA SHEET

Marilyn L. Graves
Clerk of Court of Appeals
P.O. Box 1688
Madison, WI 53701-1688

Court of Appeals District I
633 W. Wisconsin Ave., #1400
Milwaukee, WI 53203-1918

Jennifer Krapf
Administrative Assistant
119 Martin Luther King Blvd.
Madison, WI 53703

Peg Carlson
Chief Staff Attorney
119 Martin Luther King Blvd.
Madison, WI 53703

Court of Appeals District II
2727 N. Grandview Blvd.
Waukesha, WI 53188-1672

Court of Appeals District IV
119 Martin Luther King Blvd.
Madison, WI 53703

Hon. Eric J. Lundell
St. Croix County Courthouse
Hudson, WI 54016

Fred L. Neff
4515 Adoner Road
Minneapolis, MN 55435

Dale B. Lindman
Mahoney, Dougherty & Mahoney
801 Park Avenue
Minneapolis, MN 55404

Thomas O. Albers
8835 Basswood Road
Eden Prairie, MN 55344

Mark A. Fonken
444 Cedar
1900 Conwed Tower
St. Paul, MN 55101

Nathan W. Hart
Jardine, Logan & O'Brien, PLLP
444 Cedar Street, #2100
St. Paul, MN 55101

Michael J. Modl
Axley Brynelson
P.O. Box 1767
Madison, WI 53701-1767

PLEASE TAKE NOTICE that the attached page 4 is to be substituted for page 4 in the above-captioned opinion which was released on October 7, 1997.

Dated this 15th day of October, 1997.

notwithstanding the verdict (JNOV), and indemnification by Zappa in accordance with their contract. BE Architects moved for a new trial. The trial court denied all motions and entered judgment in favor of Zappa and against Con/Spec and BE Architects. This appeal followed.

Con/Spec and BE Architects both claim the trial court erroneously exercised its discretion when it denied their respective motions for a new trial. In addition, Con/Spec raises two other issues on appeal. Con/Spec claims that the trial court erred (1) when it denied its motion for judgment notwithstanding the verdict and (2) when it concluded that Con/Spec was not entitled to indemnification by Zappa. Because we conclude that the trial court reasonably exercised its discretion by refusing to grant either motion, we affirm the trial court. Regarding the indemnification agreement between Con/Spec and Zappa, we affirm the trial court because the parties' agreement does not specifically and expressly state that Con/Spec would be indemnified by Zappa where Con/Spec was negligent but Zappa was not.

BACKGROUND

This case arose out of an accident at a construction site that resulted in the death of Todd Anderson when the trench he was working in caved in. Anderson's widow, individually and as personal representative of her husband's estate, brought a wrongful death action against Con/Spec, the general contractor, and Zappa, the excavating subcontractor. Con/Spec then brought third-party claims against BE Architects, the architect on the project; Bernard Stroh, d/b/a Stroh Engineering, the structural engineer; and Advanced Concrete and Masonry, the concrete subcontractor and deceased's employer. Anderson subsequently

