

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

September 16, 1997

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. 96-0385**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**JOHN TRENHAILE, D/B/A TRENKO ELECTRIC, INC.,**

**PLAINTIFF-RESPONDENT-  
CROSS APPELLANT,**

**v.**

**J.H. FINDORFF & SON, INC.,**

**DEFENDANT-APPELLANT,**

**SAINT PAUL FIRE AND MARINE INSURANCE COMPANY,**

**DEFENDANT-CROSS RESPONDENT,**

**MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,**

**DEFENDANT.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM J. HAESE, Judge. *Reversed and cause remanded with directions.*

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

CURLEY, J. J.H. Findorff & Son, Inc., the general contractor for a major construction project built for the Milwaukee Metropolitan Sewerage District (MMSD), appeals from a judgment and order in favor of John Trenhaile, doing business as Trenko Electric, Inc., a subcontractor, entered by the trial court following a lengthy court trial. Findorff argues that the court erred in determining that Findorff breached its contract with Trenko, and in finding that Findorff's actions forced Trenko into bankruptcy. Further, Findorff claims that the trial court: (1) erred in finding Trenko was entitled to future lost profits;<sup>1</sup> (2) miscalculated the damage amount by accidentally using the numbers found in the damage expert's earlier draft; and (3) failed to offset Findorff's damages.

Trenko cross-appeals, claiming that the trial court erred in dismissing its cause of action against the bonding company, Saint Paul Fire & Marine Insurance Company. Further, Trenko contends that the trial court improperly reduced the damages by fifty percent to reflect Trenko's "faulty paperwork," thereby introducing tort principles into a breach of contract damage award.

We reverse because the trial court failed: (1) to make factual findings which would entitle Trenko to a recovery for future lost profits; (2) to use

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<sup>1</sup> The parties use "future lost profits" and "lost going concern value" interchangeably.

the correct calculations of the Trenko expert; (3) to state why the surety, Saint Paul, was being dismissed from the action; and (4) to state why Findorff's offsets and defenses were rejected. Additionally, because the trial court improperly introduced tort concepts by reducing the breach of contract damages by fifty percent, we reverse this determination as well. Accordingly, the matter is remanded for the trial court to: (1) make factual findings and determine whether the facts support an award of consequential damages; (2) utilize damage figures introduced into evidence or state the reason another figure is being used; (3) reinstate the surety, Saint Paul, and undertake a determination of what damages, if any, the surety should pay; and (4) determine whether and on what legal basis Findorff's offsets and defenses should be denied. Finally, we also instruct the trial court to determine any damage amounts without resorting to tort principles.

### **I. BACKGROUND.**

Findorff was the general contractor for a large construction project in Milwaukee consisting of two separate projects being built for MMSD. Trenko was the electrical subcontractor. The parties entered into a subcontract in February 1990, with an expected completion date of January 1993. The total due Trenko was \$1,361,971. Due to the use of public funding for the project, there were strict rules regarding payment. Findorff was required to post a bond to ensure payment of all the subcontractors and their subcontractors and suppliers. Trenko's work was also subject to inspection and the approval of both Findorff and the architect. The subcontract also included a "pay when paid" clause which meant Trenko agreed to be paid after Findorff received payment from MMSD.

In June 1992, after the bulk of the contracted work had been completed by Trenko, Trenko sold most of its business assets to another electrical contractor for \$28,000. Although Trenko had repeatedly complained about payment delays, it gave no advance warning to Findorff that it was selling its assets. At the time of the transfer of assets, Trenko had completed ninety percent of the contracted work and had been paid approximately \$1,370,000. Included in the sale was the assignment of Trenko's labor force, including the president, John Trenhaile. A week later, three unsecured creditors of Trenko—having no relationship to the MMSD project—initiated an involuntary bankruptcy proceeding against Trenko. Pieper Electric, the electrical contractor that bought Trenko's assets, completed the work subcontracted to Trenko and was paid \$43,000 by Findorff.

Findorff asserted at trial that following the sale of its assets to Pieper, Trenko stopped paying its worker's union dues, obligating Findorff to pay them according to the terms of its contract with MMSD. Also, due to Trenko's demise, Findorff became obligated to pay several of Trenko's subcontractors for labor, material, and equipment used on the project by Trenko.

In August 1992, when one of the projects was ninety-nine percent completed and the other ninety percent, Trenko and Trenhaile, now working for Pieper, stopped working on the project entirely, requiring Findorff to hire Pieper and another subcontractor to finish the work. Findorff claimed at trial that it incurred over \$70,000 worth of expenses as a result of Trenko's and Trenhaile's actions. Findorff sought all of these amounts as setoffs to any monies it owed Trenko.

This action was brought by Trenhaile when the bankruptcy trustee abandoned any claims against Findorff. Trenko then sued Findorff, its surety, Saint Paul, and MMSD, commencing the suit as the bankruptcy assignee. Trenko asserted various claims against Findorff for breach of contract, restitution, unjust enrichment, inter alia. The surety for Findorff, Saint Paul, was sued directly pursuant to § 779.14(2), STATS.<sup>2</sup> Findorff raised several affirmative defenses and also counter-claimed against Trenko and cross-claimed against MMSD. Trenko's claims against MMSD were dismissed before trial because the trial court ruled that

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<sup>2</sup> Section 779.14(2)(a), STATS., provides:

(2)(a) ... [N]o later than one year after the completion of work under the contract, any party in interest, including any subcontractor or supplier, may maintain an action in that party's name against the prime contractor and the sureties upon the bond for the recovery of any damages sustained by reason of any of the following:

1. Failure of the prime contractor to comply with the contract.
2. Except as provided in subd. 3., failure of the prime contractor or a subcontractor of the prime contractor to comply with a contract, whether express or implied, with a subcontractor or supplier for the performance of labor or furnishing of materials for the purpose of making the public improvement or performing the public work that is the subject of the contract under sub. (1m).
3. With respect to contracts entered into under s. 84.06(2) for highway improvements, failure of the prime contractor to comply with a contract, whether express or implied, with a subcontractor or supplier of the prime contractor for the performance of labor or furnishing of materials for the purpose of making the highway improvement that is the subject of the contract under sub. (1m).

....

(b) If the amount realized on the bond is insufficient to satisfy all claims of the parties in full, it shall be distributed among the parties proportionally.

under § 779.15(1), STATS.,<sup>3</sup> liens on contract funds are not available where the project is conducted within a city of the first class. MMSD, however, remained in the suit due to the cross-claims.

The case was heard by the trial court over an eight-day period. Months later, the trial court issued a memorandum decision and order. In the decision, the trial court stated that Findorff had provided either no proof or insufficient proof to merit recovery on any of its counterclaims or cross-claims, but did not explain why it reached this conclusion. The trial court awarded Trenko fifty percent of the unpaid receivables and fifty percent for “damages resulting from delay in payment,” which resulted in a damage award of approximately \$344,000. Trenko also recovered \$5,000 from Findorff under a theory of unjust enrichment as a result of the double payment of attorney’s fees incurred in an earlier dispute with MMSD. Additionally, the trial court dismissed the plaintiff’s

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<sup>3</sup> Section 779.15(1), STATS., provides:

**Public improvements; lien on contractor; duty of officials.**

(1) Any person furnishing labor or materials to be used or consumed in making public improvements or performing public work, including fuel, lumber, machinery, vehicles, tractors, equipment, fixtures, apparatus, tools, appliances, supplies, electrical energy, gasoline, motor oil, lubricating oil, greases, state imposed taxes, premiums for worker’s compensation insurance and contributions for unemployment compensation, to any prime contractor, except in cities of the 1st class, shall have a lien on the money or bonds or warrants due or to become due the prime contractor therefor, if the lienor, before payment is made to the prime contractor, gives written notice to the debtor state, county, town or municipality of the claim. The debtor shall withhold a sufficient amount to pay the claim and, when it is admitted by the prime contractor or established under sub. (3), shall pay the claim and charge it to the prime contractor. Any officer violating the duty hereby imposed shall be liable on his or her official bond to the claimant for the damages resulting from the violation. There shall be no preference between the lienors serving the notices.

claim against the surety. Findorff commenced this appeal. Trenko cross-appealed.

## II. ANALYSIS.

A trial court's legal conclusions are reviewed *de novo*. See **Block v. Gomez**, 201 Wis.2d 795, 805, 549 N.W.2d 783, 787 (Ct. App. 1996). Any factual findings made by the trial court will be upheld unless they are clearly erroneous. See **Old Republic Sur. Co. v. Erlie**n, 190 Wis.2d 400, 414, 527 N.W.2d 389, 393 (Ct. App. 1994).

### *1. Findorff's Appeal.*

Findorff argues that the trial court erred in determining that it breached its contractual obligations with Trenko, thereby causing Trenko's bankruptcy. Findorff disputes the trial court's decision that the contract was breached, contending that many of the payment delays were prompted by the "pay when paid" clause found in the contract. Findorff argues that it was actually MMSD's failure to pay Findorff promptly which led to delayed payments to Trenko. Findorff also suggests that MMSD bears responsibility for Trenko's demise and questions why the trial court made no mention of the "pay when paid" defense in the court's decision.

Findorff also argues that the trial court erred in assessing damages against it. Findorff admits owing some small outstanding receivable amounts to Trenko, but claims that these amounts were far outweighed by the offsets due Findorff. Findorff contends that it was forced to incur additional expenses both as a result of Trenko's transfer of its assets, as well as expenses above the contract amounts resulting from Trenko's shoddy work and Pieper's refusal to finish the

work without additional compensation. In its decision, the trial court, without any explanation with respect to these items, merely stated that Findorff “fail[ed] to meet the burden of proof.”

Although the trial court was in the best position to evaluate the strength of the case and the credibility of the witnesses, the trial court failed to give a rational explanation for its legal determinations regarding the claimed offsets to Findorff. It is axiomatic that this court is unable to adequately review the trial court’s ruling without findings of fact and conclusions of law which explain why the monies paid out by Findorff for union dues, excess amounts paid to Pieper, and other claimed setoffs were not compensable. Accordingly, we direct the trial court on remand to make detailed findings of fact and legal conclusions regarding the offsets.

With regard to the issue of future lost profits, Findorff argues and Trenko agrees that recovery of lost profits for a breach of contract requires three determinations: (1) the defendant’s breach of contract must be the proximate cause of the alleged damages; (2) the damages should have been reasonably foreseeable, or within the actual contemplation of the parties at the time they entered into the contract, with the understanding between the parties that the breach of the contract would cause the type of lost profit damages being alleged; and (3) any future profits must be proven with “reasonable certainty.” *See* 2 THE LAW OF DAMAGES IN WISCONSIN § 26.4 at 26-6 (Russell M. Ware ed., 2d ed. 1995). Findorff suggests that the trial court erred with regard to all three elements. Trenko concedes that the trial court’s decision is void of any actual findings of fact or conclusions of law regarding these issues, but argues the trial court implicitly found all the elements were met when the trial court permitted a recovery for lost profits as a result of the contract breach.

With respect to the first prong that the defendant's breach must be the proximate cause of the plaintiff's damages, Findorff asserts it did not cause Trenko's bankruptcy, but rather, that the undercapitalization of the company, its shaky financial history and the thin margins of profitability on its contracts were the causes. The trial court had the opportunity to weigh this evidence and decide the credibility of the witnesses. Although not addressing this issue directly, the trial court did find that Findorff caused the bankruptcy. The trial court stated that: "The delays were occasioned by Findorff's failing to pay timely funds they received or failed to seek from MMSD and in part by faulty paperwork submitted by Trenko." The trial court also determined that "[t]he bankruptcy was occasioned by the failure to receive prompt payment of monies due on the Jones Island contracts." Later, the trial court found "that the bankruptcy of Trenko was caused in large part by the failure to receive payments from Findorff promptly, and that while there were other factors, this failure to promptly receive payment was the motivating factor, which this small business organization could not survive."

When the trial court sits as the fact-finder in lieu of the jury, the standard of review is "heavily weighted on the side of sustaining [the] trial court[']s findings of fact in cases tried without a jury." *Peabody Seating Co. v. Jim Cullen, Inc.*, 56 Wis.2d 119, 128, 201 N.W.2d 546, 551 (1972). In light of the standard of review, we conclude the trial court's findings are not clearly erroneous and support its conclusion with respect to this single determination.

Turning to the next prong, which requires that the damages must be reasonably foreseeable, Findorff disputes the trial court's determination of damages as being too speculative and clearly not the type of damage ever envisioned by the parties when negotiating the contract. The trial court's decision

is devoid of any findings regarding this prerequisite for an award of consequential damages. The foreseeability component permits recovery only if the damages were contemplated at the time of the entering of the initial contract. Recovery is limited to damages ““reasonably to be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach.”” *Reiman Assocs. v. R/A Advertising*, 102 Wis.2d 305, 320, 306 N.W.2d 292, 300 (Ct. App. 1981). Here, given the scenario of a large company hiring a small business as a subcontractor for work on a multi-million dollar project, it would be necessary for Trenko to prove that Findorff anticipated that the effects of a breach of contract with its subcontractor would result in lost future profits or, at least, contemplated the possibility of such an award. Here, the trial court made no finding regarding the reasonable foreseeability of a contract breach, yet awarded Trenko the value of the company projected out over a twelve-year period. On remand, the trial court is instructed to specifically identify the facts substantiating the foreseeability component of this damage award.

Finally, the last element needed to recover damages of this type requires the claimant to prove its lost profit damages with “reasonable certainty.” Reasonable certainty “does not mean that a plaintiff must prove damages with mathematical precision; rather, evidence of damages is sufficient if it enables the jury to make a fair and reasonable approximation.” *Management Computer Servs. v. Hawkins, Ash, Baptie & Co.*, 206 Wis.2d 157, 188, 557 N.W.2d 67, 80 (1996). Findorff argues that the lost profit amounts are pure speculation. Although the trial court’s decision refers to the testimony of the Trenko expert, Dennis Bersch, the trial court failed to explain how this testimony satisfied the reasonable certainty test. In the trial court’s decision, the trial court references Exhibit 20, which purports to be “a comprehensive summary of his [Bersch’s]

findings, together with support schedules,” but Exhibit 20 does not contain the same amounts contained in the trial court’s order.<sup>4</sup> Nor has the trial court explained why the unusual formula used by the expert in its damage analysis was appropriate.<sup>5</sup> “Damages for lost profits need not be proven with absolute certainty, but the claimant must produce sufficient evidence ... on which to base reasonable inference as to a damage amount. To establish lost profits, the claimant must produce evidence of the business’s revenue as well as its expenses.” *Lindevig v. Dairy Equip. Co.*, 150 Wis.2d 731, 740, 442 N.W.2d 504, 508 (Ct. App. 1989) (citation omitted). The trial court’s lack of analysis is particularly troubling as the court awarded damages of over half a million dollars for a company that was sold for only \$28,000.

It is a well-known principle that in order for an appellate court to review a trial court’s decision, that decision must be the product of a rational mental process whereby the facts of record and the law relied upon are stated together. This has not occurred here. On remand, the trial court is instructed to determine whether to award damages necessarily following from the breach and, if such a finding is made, then to award damages which satisfy the reasonable certainty test. Additionally, the trial court should clarify which damage amounts it is using and determine whether they are trustworthy and reasonable.

## *2. Trenko’s Cross-Appeal.*

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<sup>4</sup> The dollar figures in the trial court’s order are the same as those of an early draft of Mr. Bersch’s, which was introduced into evidence for a reason other than proving up damages. The figures utilized by the trial court did not reflect the expert’s final opinion on damages.

<sup>5</sup> The expert used “like industry” profit averages in lieu of the actual profit history of the company and ignored both the tax records and the bankruptcy schedules when calculating the current and future worth of the company.

Trenko argues that the trial court's reduction of the damages flowing from the breach of contract and the uncollected receivables by fifty percent is improper. In its decision, the trial court opined that the reason for the fifty percent reduction is because "the delays were occasioned ... in part by faulty paperwork submitted by Trenko ... that Findorff is entitled to an offset based on such division of responsibility and the damages due Trenko from Findorff should be reduced by 50 percent." Trenko contends the reduction is based on tort principles and is inappropriate in determining breach of contract damages. Findorff responds that the trial court must have believed the parties were equally to blame for the failure of Trenko and, as a result, Findorff urges this court to reject the cross-appeal and overturn the trial court's "cause" determination. Findorff posits that a party who is equally to blame for a breach of contract cannot be found to be "a motivating factor" (as found by the trial court) causing the breach. The memorandum decision, however, states that the trial court saw Findorff as the responsible party for the bankruptcy and the breach. The trial court's decision is not, however, instructive on what circumstances or what case law led the court to reduce the damage figure. Based on our reading of the trial court's decision, we conclude the trial court improperly mixed the determination of tort damages with that of breach of contract awards. The trial court is instructed to reinstate the subtracted fifty percent to any damage award. Findorff has also urged this court to entertain the notion that the trial court's decision violated both the "new business rule" and statutory estoppel doctrine. These defenses were never raised before the trial court and will not be heard on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (Issues not raised or considered in the trial court will not be considered for the first time on appeal.).

Finally, Trenko cross-appeals the trial court's decision to dismiss Findorff's surety, Saint Paul, from the lawsuit. Although Saint Paul is never mentioned by name, the trial court did order: "All causes of action against any party except as set forth above be dismissed." No rationale is given for the trial court's action. Wisconsin law requires a surety bond for all public works contracts. *See* § 779.14, STATS. Section 779.14(2)(a) permits a subcontractor to bring a direct action against the surety. Saint Paul concedes that it is responsible for any amounts due from Findorff for unpaid receivables, but Saint Paul seeks to distinguish between the types of damages awarded by the court and limit its exposure to only the unpaid receivables. Trenko argues that Saint Paul is directly liable for the recovery of *any damages* sustained by reason of the failure of Findorff to comply with a subcontractor. *See* § 799.14(2)(a)1. The trial court has made neither findings of fact nor conclusions of law with respect to Saint Paul. Saint Paul is reinstated as a party to this action. On remand, the trial court is instructed to determine the extent of Saint Paul's exposure.

In sum, we must reverse and remand the matter to the trial court for further consideration consistent with this opinion. On remand, the trial court shall: (1) make detailed factual findings and determine whether the facts support an award of consequential damages, foreseeability and reasonable certainty; (2) either utilize the damage figures introduced into evidence or make specific findings and conclusions as to why another damage figure is being used; (3) reinstate the surety, Saint Paul, and determine what damage, if any, the surety must pay; and (4) determine whether and on what legal basis Findorff's offsets and defenses should be denied. Finally, the trial court should determine any damage amounts without resorting to tort principles.

*By the Court.*—Judgment reversed and cause remanded with directions.

Not recommended for publication in the official reports.

**NO. 96-0385 (CD)**

SCHUDSON, J. (*concurring in part; dissenting in part*). I depart from the majority's conclusion in only one regard. I would also reverse what seems to have been the trial court's determination that Findorff breached its contract with Trenko. On this issue, confusion consumes not only the trial court's decision but also the appellant's brief and the majority's decision.

In its Decision and Order, the trial court, in the section titled, "Breach of Contract," wrote: "Voluminous testimony indicated that the contracts between MMSD and Findorff and Findorff and Trenko were *honored in the breach* and that the procedures as set forth therein were not, in many instances, followed." (Emphasis added.) Later, in the section titled, "Findorff Counterclaims," the trial court wrote "that there is insufficient proof that Trenko breached its contract with Findorff, until *the contract had been abrogated by all parties based on performance in a manner which indicated they were mutually following a procedure different from that spelled out in the written contract....*" (Emphasis added.)

Did Findorff breach the contract? If so, how? The trial court decision refers to Findorff "failing to pay timely funds [it] received or failed to seek from MMSD" but, in the same sentence, also connects "[t]he delays" in payment to Trenko to Trenko's own "faulty paperwork." Further, the trial court decision never clarifies whether Findorff, consistent with its contracts, paid Trenko when paid by MMSD, or, in violation of its contracts, failed to timely pay Trenko despite having been paid by MMSD. In short, the trial court decision never identifies Findorff's breach and, if anything, suggests that all three parties,

deviating from their contracts, "were mutually following a procedure" that somehow constituted compliance with their contracts, albeit "in the breach."

Findorff's brief to this court presents arguments that implicitly challenge any finding that it breached its contract with Trenko. The brief, however, explicitly addresses causation and damages, not what seems to have been the trial court's conclusion that Findorff breached the contract.

The majority first writes that "Findorff argues that the [trial] court erred in determining that Findorff breached its contract with Trenko, *and* in finding that Findorff's actions forced Trenko into bankruptcy. Majority slip op. at 2 (emphasis added). Later, however, the majority writes that "Findorff argues that the trial court erred in determining that it breached its contractual obligations with Trenko, *thereby* causing Trenko's bankruptcy." *Id.* slip op. at 7 (emphasis added). There is a difference. The majority then fails to address *whether* Findorff breached its contract with Trenko and, instead, assumes that it did so and addresses whether the breach caused the challenged damages.

Thus, on the issue of *whether* Findorff breached, I do not know: (1) what the trial court determined; (2) whether Findorff is challenging what it apparently assumes to have been the trial court's determination of breach; and (3) why the majority has not addressed what it assumes to be Findorff's argument on *whether* it breached the contract. Further, agreeing with the majority that the trial court's decision is so deficient as to virtually defy appellate review, and appreciating the inextricable connections among the several issues the resolution of which probably will depend on the factual findings, I would urge the trial court to "go back to the drawing board" and make factual findings to determine *whether* Findorff breached its contract with Trenko.

