COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP442 **Cir. Ct. No. 2004CV86**

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

TODD DONNER,

PLAINTIFF-APPELLANT,

V.

DALE PETERSON D/B/A DALE MOVERS,

DEFENDANT-RESPONDENT,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL from an order of the circuit court for Burnett County: EUGENE D. HARRINGTON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Todd Donner appeals an order dismissing his negligence claims arising from damages allegedly caused when Dale Peterson

moved a building for Donner, referred to as the "Gallery." After a non-jury trial, the circuit court concluded that Donner did not satisfy his burden of proof with regard to causation. We affirm.

¶2 Donner purchased four buildings that were to be relocated to a different site, but only the Gallery is at issue in this case. Donner paid $500 for the Gallery, and intended to restore and utilize the building to operate a carpet and flooring business. Donner hired Peterson to move the buildings. There was no written contract, but it is undisputed that Peterson agreed to lift the Gallery from its original location, move it to its new location and set it down on an existing support structure that Donner was to construct. The foundation was to consist of six courses of concrete block brought to ground level, on top of which Donner was to construct a wooden "knee wall" of 2x6's approximately two feet nine inches high on which the Gallery would be attached. There is no dispute that Peterson provided advice on how to construct the knee wall. The parties dispute whether the knee wall was entirely constructed and attached to the foundation when the Gallery arrived at the new site.

¶3 Donner claimed that the Gallery was damaged during the move. The case was tried to the court. Donner asserted that on the date the Gallery was placed onto the new foundation, Peterson's crew cut out sections of the knee wall prior to placing the building and did not replace them. Donner also claimed he discovered that the knee wall was missing lag bolts and that the top of the knee wall was not attached to the building. Several weeks later, Donner claimed he discovered a hole in the roof and that the front deck was separated from the building. Donner insisted he could do nothing to repair the building. Donner also claimed that he "couldn't get anybody else to do any work on it because of the

way it was leaning." Donner also contended that "[b]ecause it wasn't secured, everyone was scared to get underneath it." Peterson disputed Donner's claims and testified that there was no damage to the Gallery after he placed it on the foundation.

¶4 Donner testified that it would be less expensive to demolish and replace the building than to repair it. According to Donner, the cost of "duplicating" the building and putting the building "back in the way it used to be" was $101,743. In addition, Donner sought net yearly projected lost profits of $65,204.04. Donner claimed total net lost profits of $97,806.06 from June 1, 2002 through December 2004.

¶5 After the completion of testimony, the circuit court granted a motion to dismiss. The court concluded that Donner had failed to satisfy his burden of proof with regard to causation. Relying upon photographic exhibits, the court found Peterson's testimony more credible with regard to the condition of the Gallery at the time Peterson delivered the building. The court noted that the photographs showed there was not a continuous knee wall in place. The court also indicated that Peterson had characterized the soil structure as swampy. The court noted "significant amounts of standing water on and about the premises. And that relates to credibility." The court also emphasized that some of the photographs depicted freshly tilled soil while others depicted "a lot of weeds, quack grass [and] other things." The court concluded the difference in the time of the year in the photographs was significant but unexplained by Donner. Some of the photographs were clearly taken much later in the growing season. The court noted that "[p]art of the deck has collapsed, and there is some building material[] that either fell on top of those or something." The court noted considerable damage to the Gallery

but concluded that Donner had failed to provide evidence of causation between the placement of the building and the shifting of the building. Donner appeals.

¶6 Donner's only clearly articulated discernable argument on appeal is that the circuit court made a factual finding that the hole in the roof was made during the moving process, and once this conclusion was made, the court was compelled to make a determination of damages for the loss. Our conclusion is to the contrary. Even if we assume for the sake of argument that the trial court made such a factual finding,[1] it does not compel a conclusion sustaining Donner's claimed damages. In his briefs to this court, Donner does not point to proof relating to damages caused solely by the hole in the roof. Indeed, at trial his proof of damages to the building was contained in exhibit 24, which contains a generalized "construction cost estimate" for a "single level office/showroom." Donner attempts to place all of these damages on the hole in the roof, but his insistence does not relieve him of the burden of proving the hole in the roof was a cause of his entire damages. Nor does Donner provide any argument or legitimate mechanism for attributing certain items of damage to the hole in the roof and we will not craft an argument for him.

¶7 Moreover, at trial, Donner sought very significant lost profits, although this was a new and unproven business. Cross-examination revealed that Donner had no commitments of any kind to supply carpet or floor coverings to anyone in northwestern Wisconsin, nor any contracts with suppliers to provide Donner with carpets or floor coverings. Donner did not present credible

[1] Peterson disputes that the trial court found that the hole in the roof was made during the move. He characterizes the court's statement in this regard as "merely the court making some comments, not findings." We address this matter below.

comparable evidence or business history and experience sufficient to allow a fact-finder to reasonably ascertain future lost profits for a new business. *See* ***T & HW Enters. v. Kenosha Assocs.***, 206 Wis. 2d 591, 605 n.6, 557 N.W.2d 480 (Ct. App. 1996). Similarly, there was no evidence presented at trial that would allow a court to reasonably ascertain the profitability of a new flooring business in that area. The evidence in this record would make a determination of any lost profits for this new business speculative as a matter of law. *See* ***Mrozek v. Intra Fin. Corp.***, 2005 WI 73, ¶¶38-42, 281 Wis. 2d 448, 699 N.W.2d 54. However, Donner does not attempt to discuss lost profit damages on appeal, nor even indicate whether damages related to the hole in the roof would include his claim for lost profits.

¶8 Alternatively, we are not convinced that the trial court specifically made a factual finding that the hole in the roof was made during the moving process, as opposed to simply being a comment made by the court in the midst of closing arguments during a colloquy with counsel. In his briefs, Donner extracted one sentence from the transcript. The statement by the court, in context, was as follows:

> THE COURT: Mr. Whitley, this case isn't about a hole in the roof. This case is about the knee wall and whether the placement of the house and the knee wall caused the huge damage that's here. That hole in the roof, indeed it looks like it probably occurred in the moving process. But that isn't where you get the hundred thousand dollars worth of damages that you're talking about. That isn't where that comes from. That's ridiculous.

¶9 After considerable further argument from both counsel, the court ultimately rendered its oral decision:

> To prevail, the plaintiff has to show that the defendant was negligent. He had a contractual duty; no question about it. The duty was to pick up, move, and deliver. He did that.

> The problem that I have is what was the condition at the time he delivered. Clearly I tend to believe Mr. Peterson when he says that the knee wall was not in place. The photographs suggest it wasn't in place. The way these temporary walls or this knee wall was here, was in place, suggest to me that it was not a continuous knee wall around the perimeter of the building. These photographs clearly suggest that Peterson's version of these events is more believable than Donner's.
>
> There has been considerable damage to the house—not the house—gallery building, or this structure. Was the damage caused because the knee wall structures as constructed were inadequate? Was the damage caused because Peterson installed them inappropriately? Was the damage caused because Peterson didn't shore it up at the time he had his machinery there and the shoring could have been accomplished without danger to workmen or other folks? Or was the damage caused by the shifting of the building for some unknown reason?
>
> The evidence lacks—the evidence is lacking as to cause. And that's my conclusion. Plaintiff has failed to show the essential elements of the cause of action. The complaint is dismissed with prejudice.

¶10 The court did not indicate that it was making any factual finding with regard to the hole in the roof. We also note that the court's "Findings and Order" prepared subsequent to its oral decision does not contain any reference to a finding regarding a hole in the roof, nor is the court's oral decision incorporated into the Findings and Order by reference. We therefore decline to conclude that the court's comment made during a colloquy in closing arguments constitutes a factual finding.

¶11 Donner insists on appeal that the court's "rhetorical question[s]" regardless of how answered, "can only point to Mr. Peterson's liability." Donner argues the court "had no option but to conclude that an improperly installed or supported knee wall led to the collapse." We are not persuaded. As the court pointed out after Donner rested his case-in-chief:

> THE COURT: What damage occurred in the move? There isn't any proof that there was any damage during its move other than you're asking me to make the leap from it was okay before, and a couple days after the move and the placement it's not okay. I'm having trouble with that causation leap that you're asking me to make.
>
> MR. WHITLEY: Well, I think it's a reasonable conclusion based upon the evidence. I mean, if my clients weren't there to witness the damage, it doesn't mean that it didn't happen.
>
> But the evidence is that it wasn't broken before they moved it and it was broken after they moved it. *Ergo*, it happened during the move. … But there is no other way to look at it.
>
> THE COURT: I'll take defendant's motion under advisement. …

¶12 Donner insists on appeal that "[t]here was no other evidence of how the building collapsed besides the testimony that if the knee wall is inadequate or improperly supported then it will not support the structure." According to Donner, "the evidence points directly to Mr. Peterson's conduct." This argument ignores the trial court's credibility determination and, as it did below, appears essentially to amount to *res ipsa loquitur*. However, Donner has not briefed that issue on appeal and we decline to review issues inadequately briefed. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

¶13 Donner also notes in his brief to this court that under the clearly erroneous standard of review we are to search the record for reasons to sustain the trial court's findings, citing ***Estate of Dejmal***, 95 Wis. 2d 141, 154, 289 N.W.2d 813 (1980). Nevertheless, Donner insists that "[h]ere the court can search the record forever and will never find any evidence that the wall collapsed for some 'unknown' reason." Donner misses the point. We need not search the record for evidence of an "unknown" reason. The trial court concluded that Donner had failed in his burden to produce evidence of causation. The reviewing court need

not sift the record for facts which support counsel's contentions. ***Siva Truck Leasing v. Kurman Distrib.***, 166 Wis. 2d 58, 70 n.32, 479 N.W.2d 542 (Ct. App. 1991).

¶14 Indeed, our review in this case has been unnecessarily complicated by the parties' misstatement of the record, their citation to inapposite standards of review, their failure to brief relevant areas of the law, and by their insistence upon portraying the facts as if restating their closing arguments. In addition, Donner fails to conform to the requirements of WIS. STAT. RULE 809.19 (2003-04) by citing generally to pages of the trial transcript, and his citations do not always support the allegations of fact made in the briefs. It should be clear to all lawyers that appellate briefs must give references to page and line of the record on appeal for each statement and proposition made in the appellate brief. We remind the attorneys that the rules of appellate practice are designed in part to facilitate the work of the court and that when counsel fail in rendering the court the aid contemplated by disregarding the rules, this court has not hesitated in summarily rejecting their arguments.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2003-04).