

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

August 01, 1995

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

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

No. 94-0834

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT I

GRAEBNER ENTERPRISES, INC.,
THOMAS GRAEBNER
and NANCY GRAEBNER,

Plaintiffs-Respondents,

v.

FIREMAN'S FUND INSURANCE
COMPANY OF WISCONSIN,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Milwaukee County: LOUISE M. TESMER, Judge. *Reversed and cause remanded with directions.*

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

PER CURIAM. Fireman's Fund Insurance Company of Wisconsin appeals from a judgment entered in favor of Graebner Enterprises, Inc., and its sole shareholders and managers, Thomas and Nancy Graebner (collectively,

Graebner). The lawsuit arose out of construction of a hotel. Water leaked into the building through the walls. Fireman's Fund provided comprehensive general liability insurance to Leppin Services, Inc., the subcontractor responsible for constructing the exterior walls.

Fireman's Fund raises several issues relating to insurance coverage and several issues arising out of the trial of the case. Fireman's Fund contends that Graebner's claim is for breach of contract and not tort. Fireman's Fund also contends that the loss claimed was not covered by the insurance policy it issued. It argues that the claim was not a covered occurrence, that the damages claimed were excluded from coverage because they were for repair and replacement of the insured's product, or alternatively, that other exclusions to coverage apply. Fireman's Fund also contends that the release of Leppin was ineffective to preserve any claims against Fireman's Fund. Challenging the court's trial rulings, Fireman's Fund contends that the trial court erroneously relieved Graebner of the burden of proving the insurance policy covered the loss claimed and that the trial court erred by not including in the verdict's comparative negligence question the negligence of parties previously released by Graebner. Finally, Fireman's Fund contends that the evidence was insufficient to support the jury's finding that work supervised by its insured was improperly performed.

We conclude that the damages claimed by Graebner were the result of a breach of Leppin's contractual obligations and not a violation of common law tort duty. Graebner has released all contract claims against Leppin. Therefore, we reverse the judgment on this basis and do not address the additional issues raised by Fireman's Fund. See *Gaertner v. 880 Corp.*, 131 Wis.2d 492, 496 n.4, 389 N.W.2d 59, 61 n.4 (Ct. App. 1986) (if decision on one point disposes of appeal, we do not reach other issues raised). On remand, the trial court shall enter a judgment dismissing Graebner's complaint.

This case arose out of the construction of a Hospitality Suites Hotel. Graebner Enterprises was the owner, Christine Jenks was the architect, and Korndoerfer Corporation was the general contractor for the project.

Korndoerfer hired Leppin to construct a portion of the exterior walls. The contract between Korndoerfer and Leppin provided that Leppin

would provide all labor, materials, equipment and supervision to complete "light gauge metal framing, structural studs, sound insulation, exterior wall finish systems and gypsum wallboard work" required by the contract plans and specifications. The exterior wall finish was a stucco-like product called Dryvit. The Dryvit product was applied to rigid foam boards that were affixed to the gypsum wall boards. Leppin subcontracted the actual application of the Dryvit finish to Paint Maintenance Systems, Inc.

To allow for expansion and contraction of the walls, a horizontal three-fourth-inch gap was left between the gypsum boards, with one horizontal expansion gap per floor. Korndoerfer was responsible for contracting to have the expansion gaps caulked with a flexible caulk.

The north and south walls of the hotel leaked when it rained. Fireman's Fund contends that the problem occurred because Korndoerfer did not have the expansion gaps caulked timely and because the subcontractor who did the caulking did it incorrectly. Graebner contends that the leakage occurred because Leppin negligently cut and applied the gypsum and foam boards and negligently supervised the application of the Dryvit. Graebner claimed that the foam boards were cut to meet at, rather than bridge, the seams in the gypsum layer. In areas where shifting and stress were most likely to occur, e.g., under windows, the shifting of both the gypsum and foam boards caused the Dryvit finish to crack.

Because of the leakage problems, Graebner did not pay Jenks. Jenks sued Graebner for her fee and also named Korndoerfer as a defendant. Korndoerfer filed third-party actions against Leppin, Fireman's Fund, and various other subcontractors and their insurance carriers. Leppin, in turn, filed a third-party complaint against Paint Maintenance and its insurer.

Ultimately all parties to the lawsuit, except Fireman's Fund, settled their disputes and entered into mutual releases. The releases Graebner and Korndoerfer executed in favor of Leppin specifically excluded any tort claims against Leppin that were covered by Fireman's Fund's insurance policy. During trial, Graebner's attorney acknowledged that all contract claims against Leppin had been released.

The case proceeded to trial on the theory that Graebner had a claim against Leppin for damages in tort. Fireman's Fund was the named defendant because of its insurance policy. Graebner presented evidence supporting its claim for damages for repair or replacement of the interior drywall and wall and floor coverings damaged by water seepage and mold, as well as damages for repair or replacement of Leppin's work product, i.e., the insulation, gypsum and foam boards, and Dryvit finish.

The dispositive issue in this appeal is whether Graebner's claim was for breach of contract or for damages in tort. Fireman's Fund contends that Graebner had only a claim against Leppin for breach of contract. Fireman's Fund premises its argument on the theory that Leppin had no common law duty in tort to oversee the work of Paint Maintenance. If correct, Graebner's claim against Leppin is for breach of contract, which has been released.

Graebner argues that the negligent performance or nonperformance of a contractual duty to use due care is actionable in tort. See *Colton v. Foulkes*, 259 Wis. 142, 146-47, 47 N.W.2d 901, 903-04 (1951). In *Colton*, the plaintiff claimed that the defendant contractor negligently performed its contract because its employee had negligently repaired a porch railing. The court held that the negligent performance of a contractual duty is itself a tort. *Id.*

Fireman's Fund correctly asserts that *Landwehr v. Citizens Trust Co.*, 110 Wis.2d 716, 329 N.W.2d 411 (1983), significantly restricted *Colton*. *Landwehr* held that although the contract may create the "state of things" that furnishes the basis for a tort action, the contract may not be used to create the underlying duty of care necessary for a tort claim. *Id.* at 723, 329 N.W.2d at 414. A tort claim arises out of a breach of contract only if there exists an independent, common-law duty of care. *Id.* In applying this standard, a court ignores the existence of the contract when determining if a duty of care exists. *Dvorak v. Pluswood Wisconsin, Inc.*, 121 Wis.2d 218, 220, 358 N.W.2d 544, 545 (Ct. App. 1984).

When a building is constructed for sale, however, a duty of care exists independently of any contract, and the general contractor may be liable to the purchaser for latent defects resulting from the contractor's negligent

construction. *Fisher v. Simon*, 15 Wis.2d 207, 216, 112 N.W.2d 705, 710 (1961) (a vendor/contractor who contracted to oversee construction of a building was liable in tort for negligent back-filling of area around basement walls). *Fisher* suggests that Graebner would have a tort claim against Leppin, independent of any contract, for Leppin's own negligence while constructing the walls.

Although the summons alleged that Leppin installed the Dryvit improperly and not according to the Dryvit specifications, it does not clearly identify whether it is referring to the Dryvit "system," including the gypsum and foam boards and finish, or only the finish. As previously noted, there was testimony that the manner in which Leppin installed the foam boards contributed to the system's failure. Using the special verdict questions submitted by Graebner, however, the trial court only asked the jury to find whether Leppin was "negligent in overseeing the installation of the Dryvit exterior wall finish." The special verdict did not ask whether Leppin's own work was negligently completed. Consequently, Graebner cannot claim tort liability on the basis of the installation of the foam boards.

Graebner's brief does not address whether Leppin, a subcontractor, had a common law duty in tort, separate and distinct from any contractual relationship, to supervise the work of Paint Maintenance. The crux of Fireman's Fund's argument is that there is none. In light of the deficiency in its own brief, Graebner cannot complain if Fireman's Fund's argument, however weak, is deemed admitted. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 108-09, 279 N.W.2d 493, 499 (Ct. App. 1979). Therefore, any claim against Leppin was based solely on contract and was released when Graebner executed the release of Leppin.

Because we conclude that Graebner has failed to refute Fireman's Fund's claim that Graebner's claim was not actionable in tort, any potential liability of Leppin was released. Therefore, Fireman's Fund cannot be liable to Graebner under its insurance coverage of Leppin. Accordingly, we reverse the trial court judgment against Fireman's Fund and remand the case to the trial court with directions to dismiss Graebner's complaint.

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

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