

FILED

MAR 04 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 291774-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

MARK BROTHERTON and GEORGIE BROTHERTON,
husband and wife,

Plaintiffs/Respondents,

v.

KRALMAN STEEL STRUCTURES, INC.,

Defendant/Appellant

NICKALAS KINCAID and HIS MARITAL COMMUNITY d/b/a
KINCAID CONCRETE, AMERICAN CONTRACTORS INDEMNITY
CO., and
OLD REPUBLIC SURETY CO.,

Defendants.

BRIEF OF RESPONDENTS

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I. ASSIGNMENTS OF ERROR

The trial court did not err in this case when it ruled in favor of the homeowners, Mark and Georgie Brotherton. The Brothertons have not filed a cross-appeal.

Defendant Kralman Steel Structures, Inc. has made four assignments of error regarding the Findings of Fact and Conclusions of Law.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Respondents do not raise any issues in this appeal but do assert their claim to attorney's fees on appeal.

Appellant's name two issues: (1) the proper measure of damages and (2) whether attorney's fees can be awarded against a contractor.

III. STATEMENT OF THE CASE

A. FACTS

Residential homeowners Mark and Georgie Brotherton (Brotherton) contracted with Kralman Steel Structures, Inc. (Kralman) for a new garage and replacement of their existing concrete driveway. Jeff Kralman (Mr. Kralman) orally described to the Brothertons the design and functional specifications for the new driveway. RP 30, 50. There is no dispute about the new garage building. The new driveway, however, was defective and there was damage done to the

driveway approach and sidewalk. RP 101. After one attempt to fix the defective driveway, the contractors abandoned the project after receiving full payment. RP 31, 43.

When the driveway was first done the concrete truck did some damage, so the Brothertons expanded the scope and cost of the project to replace the damaged cement. RP 28, 99-100. Brotherton told both Mr. Kralman and his subcontractor that he was willing to pay more to ensure a good quality job. RP 98 – 99. The driveway was torn out and replaced in September 2008. RP 34. The Brothertons immediately noticed that the driveway did not drain properly. RP 34. Exhibit 1. Kralman's employee called him to alert him to the defects.

In an attempt to remedy the defects, the subcontractor replaced three panels of the driveway and a small section by the patio. RP 36. After this attempted remedy, the water still puddled and ran toward the house. RP 39, Exhibit 1 last page.

During the attempted repair, Brotherton noticed that the driveway sections did not seem to be properly supported or compacted. RP 41 – 42, Exhibit 2. After the re-work, the driveway still did not drain properly. Exhibits 2, 4. Because the driveway sections were over-sized, and neither thick enough nor properly supported, they also developed unsightly

cracks. RP 15, 18, 57, 73, 85. The only feasible solution is to tear out the driveway and replace it entirely. RP 78.

After the attempted repair, these homeowners never had a chance to discuss the remaining problems with the contractor. RP 43. They were left to watch the new driveway continue to develop unsightly cracks.

Kralman's Contract of Agreement for Construction standard Terms and Conditions states in part: "All work is to be done in a workman like manner with a quality recognized by the construction industry standards as good to excellent." Defendant's Exhibit 12, p. 2. Mr. Kralman stated in a discovery response that the driveway was done to industry standards. RP 152 line 23. He then admitted at trial that it was not done to industry standards. RP 153 line 6. Mr. Kincaid, the subcontractor that actually poured and finished the driveway, was initially not satisfied with the work. RP 164 line 14. But after the re-pour of four sections, he did not come back to ensure that the problems were corrected. RP 171 lines 7-9.

Britt Watson and Ron Courson appeared as expert witnesses for Brotherton. They viewed the property and noted that the defects identified by Brotherton were substantial and the work was not to industry standards. RP 55, 57, 71-75,

Exhibits 5, 6. They are contractors and together they developed the proposal to the Brothertons which was accepted by the trial court as an appropriate remedy. Exhibit 7. Jennifer Russell also appeared as an expert witness for Brotherton. She is a geologist with expertise in geotechnical engineering. RP 26. Ms. Russell described defects she observed after Kralman/Kincaid abandoned the project and made recommendations to guide the Brothertons in choosing a proper remedy. The court found her testimony to be credible. RP 198.

B. PROCEDURE

The claim against subcontractor Kincaid and his bond was dismissed.

After two trial continuances and changes of defense counsel, this case was tried in a bench trial on March 25, 2010. The trial court issued an oral decision at the end of trial. RP 196-202. Judgment was entered and Kralman moved for reconsideration. CP 22-23. In response to the motion for reconsideration, Brotherton moved the court to amend the Findings of Fact and Conclusions of Law, and Judgment. After additional briefing, the trial court entered revised

Findings, Conclusions, and Judgment on June 9, 2010. CP 28-32, 33-35. This appeal followed.

IV. SUMMARY OF ARGUMENT

Appellant's claim that Brotherton was given several "betterments" by the trial court. In fact, there are alternative methods in concrete work. Also, repair of damage caused by the contractor are legitimate damages, not betterments. For example, thicker concrete was proposed instead of rebar or fiber mesh additives. RP 64.

The damages awarded by the trial court are appropriate in this case. Kralman breached the contract by building a driveway that did not drain properly, RP 34, was not properly compacted and supported, was not thick enough, RP 15, 18 lines 23-25, and damaged other concrete at the entrance to Brotherton's property. RP 101. The trial court properly awarded compensation to pay for repairing damage and for replacing the defective work.

Brotherton is entitled by statute to an award of attorney's fees. RCW 18.27.040 applies to lawsuits against contractors and their bonds. That section awards attorney's fees to residential homeowners who must sue a contractor to obtain a remedy for breach of contract. RCW 18.27.040(6).

Brotherton is also entitled to attorney's fees on appeal. RAP 18.1

V. ARGUMENT

1. Betterments

Kralman complains that the trial court allowed Brotherton to get paid for “betterments.” One of these so-called betterments is 5 inch concrete instead of 3 ½ inch concrete with fiber mesh. Concrete can be strengthened with rebar or, on residential work, with fiber mesh. But the uncontroverted testimony of Britt Watson is that the cost of the extra concrete compared to the time and labor to work the rebar “might be a wash.” RP 64, lines 8-10. Mr. Watson would make the concrete thicker instead of reinforced. This is not a betterment, it is another method of working with concrete.

Kralman complains that Brotherton is getting 5 ½ sack concrete rather than 5 sack concrete. Appellant’s Brief, page 3. However, Mr. Kralman testified that the job used 5 ½ sack mix with fibers. RP 124, lines 3-4. This is not a betterment, it is the same.

Kralman complains that reinforcing steel or rebar would be furnished when none was included in the contract. Appellant’s Brief, pp. 2-3. The testimony referenced is RP 63 where Mr. Watson is describing how he would tie the new concrete he pours to the existing concrete in the house foundation. This is the same exact process that Mr. Kralman describes as “doweling in” to tie the new concrete sections to existing concrete. RP 138. This is not a betterment, this is how new concrete is tied to existing concrete.

Kralman complains that Brotherton is getting a new driveway approach, curb, gutter, sidewalk to which he is not entitled. Appellant's Brief, p. 3. This is repairing damage done by Kralman's crew. RP 42, 101, Exhibit 3. Faced with conflicting testimony, the trial court found this to be credible testimony. This is not a betterment, it is putting the homeowner in the position he should have been in the first place.

Kralman assigns error to the trial court's finding that the Watson proposal of \$12,796.20 is reasonable when Finding of Fact No. 7 states that some contractors would do the work for less. CP 30. The actual evidence is that other contractors would charge more, either \$13,000 or \$16,000. RP 102, line 25; RP 136, line 22. There does not appear to be any evidence to support the statement that some contractors would do the work for less. In fact, the Brothertons had trouble finding a contractor willing to do the work. Other contractors "would not touch [the job]" RP 103, lines 7-8. It appeared to Brotherton that Kralman interfered with their first expert witness. The trial court imposed terms for that behavior. RP 201-202.

2. Damages

The case of *Crest, Inc. v. Costco Wholesale Corporation*, 128 Wn.App 760, 115 P.3d 349 (2005), involved a defective concrete slab that had to be removed and replaced. The Court stated that

Damages recoverable for a breach of contract are those which may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of

contract itself, or such as may reasonably 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 of it.

Crest, 115 P.3d at 351.

The damages included in the proposal presented to the trial court are those that arise naturally from the breach. The job was to be done in a workmanlike manner. Defendant's Exhibit 12, page 2. When a contractor damages the customer's property, the contractor should repair the damage. That is why contractors have insurance. When the work done is defective, not done to contractual specifications and does not meet performance standards, the contractor should fix the problem. As seen in the testimony, the correct solution is to remove and replace the defective driveway. RP 75, RP 102 line 22.

The *Crest* court further stated:

Here, the trial court found that the original slab poured by Crest did not meet contractual specifications and did not meet performance standards. This makes the case distinguishable from the cases allowing a repair damage award. The trial court did not err.

Crest, 115 P.3d 354.

Likewise, the work done in this case by Kralman and his subcontractor did not meet contractual specifications and did not meet performance standards. See, also, *Floor Express, Inc. v. Daly, et ux, et al*, 138 Wn.App 750, 158 P.3d 619 (2007), regarding damages caused by a subcontractor. The trial court did not err in finding the Watson/Courson proposal to be reasonable. RP 200.

3. Attorney's Fees

Appellants rely on the case of *Cosmopolitan Engineering v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 149 P.3d 666 (2006) to say that the award of attorney's fees must be limited to an award against the bond only, not against the contractor. Appellant's Brief, page 6. But the legislature has changed the law since the Washington Supreme Court decided *Cosmopolitan*. In that case the Court reasoned that the attorney fee provision of RCW 18.27.040(6) must be analyzed by reviewing the code section in its entirety. Subsection 6 refers to actions filed "under this section." The Court stated that "Review of RCW 18.27.040 in its entirety demonstrates that actions 'filed under this section' refer only to actions for recovery against the contractor's bond". *Cosmopolitan*, 159 Wn.2d at 299. The Court looked at subsection 3 and stated that it was "specifically for suits against the bond." *Id.* at 297. The Court stated that "nothing in these surrounding subsections suggests that the legislature intended to discuss actions against the contractors". *Id.* at 299.

Now look at the amendment to the beginning of subsection 3. "...may bring suit ~~((upon))~~ against the contractor and the bond". Laws of 2007, ch. 436, § 4. After this amendment, RCW 18.27.040 is clearly not limited to suits against the bond. The 2007 amendments do indeed change the analysis of *Cosmopolitan*, as well as the case it relied on, *Subcontractors and Suppliers Collection Services v. McConnachie*, 106 Wn.App 738, 24 P.3d 1112 (2001). The *McConnachie* case considered the question of personal jurisdiction on the contractor and, for reasons relied on by the

Court in *Cosmopolitan*, decided that RCW 18.27.040 applied only to suits against the bond and, therefore, did not confer jurisdiction upon the contractor. The 2007 amendments also state that the service on the department constitutes service “...for suit ~~((upon the))~~ on claimant’s claim against the contractor and the bond ...” Laws of 2007, ch. 436, § 4. Clearly the legislature changed the code section to refer to both claims against contractors **and** claims against the bond. The analysis in *Cosmopolitan* and in *McConnachie* does not apply here. These recent amendments require a different result under the facts of this case. The legislature made it clear that a lawsuit such as this one would have jurisdiction over the contractor **and** allow attorney fees against the contractor. Brotherton brought suit against the contractor and against the bond. Brotherton is entitled to an award of attorney’s fees against the contractor and against the bond. Brotherton is not limited to recovery of attorney’s fees only against the bond.

4. Attorney’s Fees on Appeal

Brotherton requests an award of attorney’s fees on appeal. RAP 18.1. The statute and case law discussed above give Brotherton an award of attorney’s fees, interest, and costs as the prevailing party against a contractor and its bond. RCW 18.27.040 as amended in 2007 applies to lawsuits by residential homeowners against contractors and their bond. The Brothertons are likewise entitled to their attorney’s fees on appeal.

VI. CONCLUSION

A proper analysis of the facts and law of this case show that (1) Kralman or his subcontractor did not properly construct the driveway; (2) Kralman or his subcontractors damaged the Brotherton curb, approach, driveway; (3) Brothertons are entitled to the benefit of their bargain; (4) the legislature changed the law to allow an award of attorney fees against the contractor; and (5) the trial court properly granted judgment for Brotherton. The Court of Appeals should affirm the trial court's Judgment. There is substantial, competent evidence to support the Findings of Fact and Conclusions of Law.

The Brothertons should be awarded their attorney's fees on appeal.

Respectfully Submitted this 3 day of March, 2011.

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